DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1533
Title: Frantz DePierre, Petitioner
v.
United States
Docketed: June 16, 2010
Lower Ct.: United States Court of Appeals for the First Circuit
Case Nos.: (08-2101)
Decision Date: March 17, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 15 2010	Petition for a writ of certiorari filed. (Response due July 16, 2010)
Jul 8 2010	Order extending time to file response to petition to and including August 16, 2010
Aug 16 2010	Brief of respondent United States in opposition filed
Sep 1 2010	DISTRIBUTED for Conference of September 27, 2010
Sep 1 2010	Reply of petitioner Frantz DePierre filed. (Distributed)
Oct 4 2010	DISTRIBUTED for Conference of October 8, 2010
Oct 12 2010	Petition GRANTED
Nov 23 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 10, 2010
Nov 23 2010	The time to file respondent's brief on the merits is extended to and including January 18, 2011
Dec 7 2010	Motion to dispense with printing the joint appendix filed by petitioner Frantz DePierre
Dec 10 2010	Brief of petitioner Frantz DePierre filed
Dec 17 2010	Brief amici curiae of Individual Physicians and Scientists Robert Booth, PhD, et al. filed
Dec 23 2010	SET FOR ARGUMENT ON Monday, February 28, 2011
Jan 3 2011	CIRCULATED
Jan 18 2011	Brief of respondent United States filed. (Distributed)
Jan 31 2011	Record received from U.S.C.A. for 1st Circuit. (1 box)
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Feb 17 2011	Reply of petitioner Frantz DePierre filed. (Distributed)
Feb 28 2011	Argued. For petitioner: Andrew J. Pincus, Washington, D.C. For respondent: Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 091533 JUN 15 2010

In the Supreme Court of the United States

FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 841(b)(1)(A) of Title 21 requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of "coca leaves" or "cocaine," or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base."

The question presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum—or whether the term "cocaine base" is limited to "crack" cocaine.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frantz DePierre respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 599 F.3d 25. The district court's oral ruling on jury instructions and its imposition of sentence (App., *infra*, 14a & 16a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. This court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Title 21, U.S. Code § 841 provides in pertinent part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years * * *.

(B) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years * * *.

2. The U.S. Sentencing Guidelines Manual § 2D1.1 (2007) provides in pertinent part:

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply * * * the offense level specified in the Drug Quantity Table set forth in subsection (c) * * * .

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table: ***

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.[1]

STATEMENT

Congress in 1986 specified two grounds for imposing a ten-year mandatory minimum penalty for cocaine-related offenses. Offenses involving 5000 grams or more of "coca leaves" or "cocaine" receive a minimum ten year sentence. And the same sentence applies to offenses involving 50 grams of a substance or mixture containing "cocaine base." 21 U.S.C. § 841(b)(1)(A)(ii) & (iii).

The courts of appeals are sharply divided with respect to the meaning of the term "cocaine base" in this statute. Six circuits, including the court below, interpret the term to include any form of cocaine that satisfies the chemical definition of a "base," notwithstanding the fact that "coca leaves" and many derivatives of "cocaine" satisfy that standard and that this construction of the statute therefore renders the first prong of the mandatory minimum standard largely meaningless. For example, requiring a ten-year minimum to be imposed for offenses involving 50 grams

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[1] The current Guidelines text is identical to the 2007 version applicable at petitioner's sentencing. U.S.S.G. § 2D1.1 (2009).

of coca leaves means that the portion of the statute permitting the imposition of the same sentence for an offense involving 5000 grams of coca leaves is surplusage. This interpretation of the statute also leads to the bizarre result that an offense involving 50 grams of raw coca leaves triggers the minimum ten-year sentence, but an offense involving 4990 grams of much more potent cocaine powder does not.

Five circuits have rejected the construction of Section 841 producing these absurd results, and hold instead that "cocaine base" has a narrower definition limited to "crack" cocaine and, perhaps, other smokeable cocaine compounds. The court below correctly recognized that this deep division among the courts of appeals "does need resolution by the Supreme Court." App., *infra*, 11a-12a. See also *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005) (observing with respect to the question presented that "[a] lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court").

The question presented arises frequently—as demonstrated by the large number of decisions by the courts of appeals. And the question is important: the imposition of a ten-year minimum sentence in a case in which the defendant otherwise would be sentenced to less than half of that term is an issue of great significance to the hundreds if not thousands of individuals sentenced in these circumstances to mandatory minimum terms each year. The disparate treatment of similarly situated defendants based solely on the place in which they are prosecuted should not be permitted to continue. Review by this Court is plainly warranted.

A. Scientific Background

Cocaine alkaloid is a naturally-occurring substance found in coca leaves.[2] It has the molecular formula $C_{17}H_{21}NO_4$. See *United States* v. *Barbosa*, 271 F.3d 438, 462 (3d Cir. 2001). Extracting the alkaloid from the coca leaves results in a substance known as coca paste, which retains the same chemical formula. *Ibid.*

Powder cocaine is formed by dissolving coca paste in hydrochloric acid (HCl) and water (H_2O). That compound, cocaine hydrochloride, has the molecular formula $C_{17}H_{22}ClNO_4$. *Barbosa*, 271 F.3d at 462. That substance is classified chemically as a salt. "Crack" cocaine is created by mixing cocaine powder with water and sodium bicarbonate (*i.e.*, baking soda). "Freebase" cocaine results from mixing the powder with a strong alkaloid solution and an organic solvent. 1995 U.S.S.C. Report at 13-14. These solid substances both have the same chemical formula as coca paste, $C_{17}H_{21}NO_4$. *Barbosa*, 271 F.3d at 462.[3]

"The definition of a base * * * is a substance that when combined with an acid produces a salt." *United States* v. *Booker*, 70 F.3d 488, 490 n.6 (7th Cir. 1995). Any substance with the molecular formula of $C_{17}H_{21}NO_4$—a category that includes cocaine alkalo-

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[2] U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy at 7 (1995), available at http://www.ussc.gov/crack/exec.htm [hereinafter 1995 U.S.S.C. Report].

[3] It is possible to combine coca paste with other acids, such as sulfuric acid (H_2SO_4), to create different cocaine salts, but cocaine hydrochloride appears to be by far the most common form in the United States. See *Barbosa*, 271 F.3d at 462; 1995 U.S.S.C. Report at 10.

id in coca leaves, coca paste, non-powder cocaine, freebase cocaine, and crack cocaine—is classified chemically as a base.

Cocaine powder can be ingested or snorted, leading to absorption through the nasal passageway, or dissolved in water and injected. *Barbosa*, 271 F.3d at 462. It cannot, however, be smoked, because the higher temperatures required to vaporize cocaine hydrochloride decompose the cocaine molecule. 1995 U.S.S.C. Report at 12-13. Freebase and crack cocaine can be smoked, allowing absorption through the lungs. *Id.* at 14-15.

B. Statutory Background

The Anti-Drug Abuse Act ("ADAA"), Pub. L. No. 99-570, 100 Stat. 3207, enacted in 1986, creates the framework for punishing drug-related offenses. The quantity and type of drugs involved in an offense trigger specified mandatory minimum sentences.

The statute provides a mandatory minimum 10-year sentence for cocaine-related offenses involving:

- "5 kilograms or more of a mixture or substance containing a detectable amount" of "coca leaves" or "cocaine"; or
- "50 grams or more of a mixture or substance" containing coca leaves or cocaine that "contains cocaine base."

21 U.S.C. § 841(b)(1)(A)(ii) & (iii). A five-year mandatory minimum applies to offenses involving 500 grams or more of mixtures containing coca leaves or cocaine, and those involving 5 grams or more of such mixtures that contain cocaine base. *Id.* § 841(b)(1)(B)(ii) & (iii). The statute does not define the terms "cocaine" or "cocaine base."

The legislative history of the ADAA indicates that Congress enacted the statute to address the then-widespread use of crack cocaine by imposing penalties targeting that form of the drug. As Senator Chiles stated:

> [T]itle I addresses the widespread emergence of crack cocaine in this country. As one who has introduced several bills addressing this lethal drug, I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties. The bill also recognizes crack's insidious impacts on neighborhoods by outlawing crack houses and doubling penalties for those who manufacture drugs within 1,000 feet of our schools.

132 Cong. Rec. S14270-01, 1986 WL 785375 (Sept. 30, 1986); see also *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 1 (1986) (discussing the "frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack'") (statement of Sen. Roth); *United States* v. *Perry*, 389 F. Supp. 2d 278, 288-289 & n.11 (D.R.I. 2005) (discussing legislative history).

Following enactment of the statute, the United States Sentencing Commission revised its guidelines to accord with the ADAA's mandatory minimum prescriptions. See *United States* v. *Shaw*, 936 F.2d 412, 415 (9th Cir. 1991).

Interpreting both the statute and the sentencing guidelines, the courts of appeals reached conflicting conclusions regarding the meaning of the term "cocaine base." Some courts held the term limited to crack cocaine, while others interpreted it to include all chemically basic forms of cocaine, including coca leaves and coca paste as well as crack and freebase cocaine. Compare *United States* v. *Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992) (holding that "cocaine base" is not limited to crack but includes all forms of cocaine base according to the scientific meaning of the term); *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir. 1992) (same); with *Shaw*, 936 F.2d at 416 (holding that "cocaine base" means "crack").

The Sentencing Commission responded to these decisions by submitting to Congress in 1993 a report containing an amendment to the Guidelines defining "cocaine base" as limited to "crack cocaine." U.S.S.G. § 2D1.1(c) (Notes to Drug Quantity Table). The amendment added a note to the Guidelines' Drug Quantity Table stating that "'[c]ocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." See *United States* v. *Montoya*, 87 F.3d 621, 623 (2d Cir. 1996) (quoting Sentencing Guidelines § 2D1.1(c) (eff. Nov. 1, 1993)).

The Commission made clear that, "[u]nder this amendment, forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine [hydrochloride]."

Montoya, 98 F.3d at 623 (quoting Sentencing Guidelines App. C, Amend. 487 (eff. Nov. 1, 1993)). After the prescribed period of Congressional review, 28 U.S.C. § 994(p), the amendment went into effect.

The sentencing guidelines amendment did not eliminate the conflict among the courts of appeals with respect to the proper interpretation of Section 841(b)'s text imposing higher mandatory minimum sentences for offenses involving "cocaine base." That conflict, which has persisted and deepened following the revision of the sentencing guidelines, is the subject of the question presented in this petition.

C. Proceedings Below

1. Petitioner was charged with distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1), and the government sought a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii).

The government argued to the district court that the jury was required to find only that petitioner distributed "cocaine base, not that it was the particular form of cocaine base known as crack cocaine." Tr. 443.[4] Petitioner requested that the jury be instructed that it was obligated to find that petitioner's offense involved "not just cocaine base, but the form known as crack cocaine." Tr. 512. The district court ruled that "the question is cocaine base; that is, the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine." App. *infra*, 13a.

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[4] "Tr." refers to the trial transcript.

The court's instructions directed the jury to determine whether the controlled substance was "cocaine base," pointing out that there had been testimony about "crack cocaine" but that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." Tr. 585; see also Tr. at 595 (reemphasizing government's burden to prove "that what was involved was cocaine base"). The verdict form likewise required the jury to find only that petitioner possessed cocaine base. App., *infra*, 16a-17a.[5]

Following petitioner's conviction, the district court sentenced him to ten years in prison—the minimum sentence possible given the court's determination that "cocaine base" in Section 841 means all chemically basic forms of cocaine—because the court believed that it was compelled to impose that sentence. The district judge stated:

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[5] Moreover, the evidence would not have supported a finding that petitioner's offense involved crack cocaine. The government's expert witness was "not able to identify baking soda in th[e] sample" (Tr. 499)—and baking soda would have been present if the substance had been crack cocaine (see page 6, *supra*).

The court of appeals erred in suggesting that "some evidence indicates the substance here was crack." App., *infra*, 10a. The district court did "repeatedly refer[] to [the substance] as crack" at sentencing (see *ibid.*), but that was because after the district court's jury instruction the parties used the term "cocaine base" and "crack cocaine" interchangeably. See Aid in Sentencing Memo. at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW-1 (D. Mass. Aug. 6, 2008) (Dkt. #56) ("Mr. Depierre was convicted of possessing a firearm with an obliterated serial number, distribution cocaine, and distributing over 50 grams of cocaine base ('crack cocaine').").

> I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation [of 41-51 months] that [petitioner's counsel] made than it is to that which the government made, but I don't have the choices here. So, under these circumstances, I've given you the lowest sentence in terms of incarceration that I can * * *.

App., *infra*, 15a.[6]

2. The court of appeals affirmed, rejecting petitioner's contention that the term "cocaine base" in Section 841(b)(1)(A)(iii)—the provision requiring the ten-year mandatory minimum sentence—should be construed to encompass only crack cocaine and not other forms of cocaine categorized chemically as a base.

The court stated while crack was "admittedly" the main focus of Congress's concern in passing the Act, prior First Circuit precedent held that "cocaine base" in Section 841(b)(1)(A)(iii) "refers to 'all forms of cocaine base, including but not limited to crack cocaine.'" App., *infra*, 10a (quoting *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006)).

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[6] Petitioner also was convicted of distributing cocaine in powder form, in violation of 21 U.S.C. § 841(a)(1); and he pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Judgment in a Criminal Case at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW-1 (D. Mass. Aug. 8, 2008) (Dkt. #59). Neither of those convictions carried a mandatory minimum sentence. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(a)(1)(B).

The court below observed that other courts of appeals had adopted conflicting interpretations of the statute, and stated that "[b]ecause of the circuit split this issue does need resolution by the Supreme Court." App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

The clear and unresolved circuit split over the definition of "cocaine base" demands this Court's intervention. At present, roughly half of the courts of appeals punish those individuals found with chemically basic forms of cocaine other than crack with the mandatory minimums that the other half of the circuit courts reserve only for cases in which the government proves possession of crack cocaine. That clear conflict on an important question that arises with considerable frequency necessitates this Court's intervention.

Moreover, the interpretation of the statute adopted by the court below violates three well-settled canons of statutory construction: the principle that a statute should not be interpreted in a manner that renders some of its provisions surplusage, the rule that statutes should not be interpreted to produce absurd results, and the rule of lenity. The alternative interpretation is consistent with the relevant plain language and produces none of these impermissible results. The petition for a writ of certiorari should be granted.

A. There Is A Deep, Well-Established Conflict Among The Courts Of Appeals Regarding The Question Presented.

The eleven courts of appeals that have addressed the meaning of "cocaine base" in 21 U.S.C. § 841(b) are sharply divided with respect to the proper inter-

pretation of that term. The First, Second, Third, Fourth, Fifth, and Tenth Circuits hold that "cocaine base" includes all chemically basic forms of cocaine. Those decisions squarely conflict with the determinations of the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits, holding that "cocaine base" encompasses only "crack cocaine" (or, in the case of the D.C. Circuit, potentially any smokeable form of cocaine).[7]

The courts of appeals have repeatedly recognized the persistent conflict and urged this Court to address the issue. The Seventh Circuit stated that "[a] lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court." *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005). The court below expressed the same view: "[b]ecause of the circuit split this issue does need resolution by the Supreme Court * * *." App., *infra*, 11a.

1. The Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have interpreted "cocaine base" to mean only crack and, perhaps, other smokeable types of cocaine base.

Five courts of appeals have given "cocaine base" a narrow definition. Four courts have held that it includes only crack cocaine. See *United States* v. *Hig-*

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[7] Although the Eighth Circuit has, in some cases, equated "cocaine base" with "crack," see *United States* v. *Vesey*, 330 F.3d 1070 (8th Cir. 2003), its subsequent decisions reserving the issue indicate that the court has not yet resolved the issue definitively. See, *e.g.*, *United States* v. *Williams*, 557 F.3d 556, 562 (8th Cir. 2009). See also *United States* v. *Higgins*, 557 F.3d 381, 395 & n.3 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009).

gins, 557 F.3d 381, 394 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009); *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005); *United States* v. *Booker*, 70 F.3d 488, 490 (7th Cir. 1995); *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007); *United States* v. *Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).

Thus, the Sixth Circuit holds that "the term 'cocaine base' as used in § 841 means 'crack cocaine.' * * * [B]efore the enhanced penalties of § 841 can apply, the indictment must charge and the jury must find beyond a reasonable doubt that the defendant committed a crime involving crack cocaine." *Higgins*, 557 F.3d at 395-96. See also *Booker*, 70 F.3d at 494 ("[I]t is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine."); *Hollis*, 490 F.3d at 1156 ("We read the statute, therefore, as requiring the indictment to charge and the jury to find 'crack' to trigger the enhanced penalties associated with cocaine base."); *Munoz-Realpe*, 21 F.3d at 377 (rejecting the government's challenge to a definition of "cocaine base" as "crack").

The D.C. Circuit has similarly refused to interpret "cocaine base" to include all forms of cocaine taking a basic, rather than salt, form:

> [A chemical] approach to interpreting "cocaine base" would be problematic. Congress could hardly have intended to apply the enhanced penalties to forms of cocaine base that are not smokable or even consumable without further processing [*i.e.*, coca leaves], while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride.

United States v. *Brisbane*, 367 F.3d 910, 913 (D.C. Cir. 2004).

That court considered two possible definitions of "cocaine base"—either all smokeable forms of cocaine or crack cocaine. It did not reach a final conclusion on the issue, however, as the government had proven neither possession of smokeable cocaine nor possession of crack. *Brisbane*, 367 F.3d at 914.

2. *The First, Second, Third, Fourth, Fifth, and Tenth Circuits have held that "cocaine base" includes any form of cocaine qualifying chemically as a base.*

Six courts of appeals have adopted a conflicting interpretation of the statute, construing "cocaine base" to mean all chemically basic forms of cocaine.

The Third Circuit holds that "'cocaine base' encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated." *United States* v. *Barbosa*, 271 F.3d 438, 467 (3d Cir. 2001).

The five other courts of appeals have reached the same conclusion. See *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006) ("[A]lthough § 841(b)(1) does not define 'cocaine base,' * * * that the term, as used in the statute, includes all forms of cocaine base, including but not limited to crack cocaine.") (quoting *United States* v. *Lopez-Gil*, 965 F.2d 1124, 1134 (1st Cir. 1992)); *United States* v. *Jackson*, 968 F.2d 158, 162 (2d Cir. 1992) ("We decline to equate cocaine base with 'crack' cocaine."); *United States* v. *Ramos*, 462 F.3d 329, 333-34 (4th Cir. 2006) (agreeing with the Second Circuit in *Jackson* and finding no error in jury instructions that did not require a

specific finding that the offense involved crack cocaine); *United States* v. *Butler*, 988 F.2d 537, 543 (5th Cir. 1993) ("Although a substance does not appear to be crack cocaine, it may nevertheless be cocaine base within the meaning of § 841(b)."); *United States* v. *Easter*, 981 F.2d 1549, 1558 n.7 (10th Cir. 1992) (holding that the plain language of statute controls in absence of congressional intent to limit cocaine base to crack cocaine).

* * * * *

If petitioner had been tried in Chicago, Atlanta, the District of Columbia, Los Angeles, Detroit, or San Francisco, he would not have been subject to the ten-year mandatory minimum sentence imposed in this case. It is only because he was prosecuted in Boston that the mandatory minimum applied. And persons in the same situation charged in New York, Philadelphia, Baltimore, Houston, and numerous other cities would also be subject to a ten-year minimum sentence. That grossly disparate treatment of similarly-situated individuals is intolerable, and review by this Court of the question presented is therefore plainly warranted.

B. The Question Presented Is Important—Because Of Its Significant Impact On The Applicability Of The Ten-Year Mandatory Minimum Sentence—And Arises With Great Frequency.

Whether "cocaine base" means only crack cocaine or instead includes all chemically basic forms of cocaine has a very substantial effect on the sentences imposed upon defendants convicted of offenses involving cocaine. Under the approach applied below and in five other circuits, the ten-year minimum ap-

plies to offenses involving only 50 grams of coca leaves or coca paste. In the five circuits adopting the narrower construction of the statute, the statutory minimum sentence for a first such offense would be one year. 21 U.S.C. § 844.

The considerable additional jail time resulting from the broad interpretation of "cocaine base" applied by the court below and other courts of appeals has a very significant real-world effect, especially when sentences may be imposed consecutively. "To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake." *Barber* v. *Thomas*, No. 09-5201, at *18 (U.S. June 7, 2010) (Kennedy, J., dissenting).

This interpretation of the statute also confers a tremendous amount of leverage on the government. Simply by choosing to include a charge under the mandatory minimum provision, the government may transform a case involving 50 grams of coca leaves or coca paste from a routine drug offense into one carrying a ten-year minimum, because those substances qualify as "cocaine base." This charging option therefore enables the government to exert tremendous pressure on potential defendants. In the circuits applying a narrow definition of "cocaine base," by contrast, the government is deprived of that leverage.

The issue is not only important, but it also recurs with great frequency. The number of decisions from the courts of appeals addressing the issue demonstrates that fact.

And it is confirmed by Sentencing Commission statistics indicating that in fiscal year 2009 alone, 4613 individuals received mandatory minimum sen-

tences based on offenses involving "powder cocaine," and 4566 individuals received such sentences based on "crack cocaine."[8] Because these are the only two categories of sentencing data for cocaine-related offenses, it appears quite likely that the "crack cocaine" category actually reflects all mandatory minimum sentences based on the "cocaine base" prong of Section 841(b)—and therefore includes a significant number of sentences imposed for offenses involving cocaine-related substances *other than* crack cocaine.[9] Discounting that number for offenses actually involving crack cocaine, it remains clear that the question presented here involves a significant number of individuals every year.

Indeed, commentators have noted the importance of the question presented and the need for clarification by this Court. See, *e.g.*, Andrew King, Comment, *The Meaning of the Term "Cocaine Base" in 21 U.S.C. § 841(B)(1): A Circuit Split Over Statutory Interpretation*, 48 Duq. L. Rev. 105, 121-22 (2010) ("The Supreme Court can intercede and adopt an interpretation that will apply to all the circuits, removing the disparity that this circuit split has created. * * * [I]t is clear this issue is ripe for intervention."); Andrew C. MacNally, Note, *A Functionalist Approach to the Definition of "Cocaine Base" in § 841*, 74 U. Chi. L. Rev. 711, 744 (2007) (a uniform definition will "pro-

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[8] United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Fiscal Year 2009, Table 43, available at http://www.ussc.gov/ANNRPT/2009/Table43.pdf.

[9] The Sentencing Commission's explanation of its data indicates that it is based on information "obtained from the presentence report and represents the assessment of the probation officer." *Id.* Appendix A at 8, available at http://www.ussc.gov/ANNRPT/2009/appendix_A.pdf.

vide[] a solution to a circuit split that has lingered for over a decade"); Spencer A. Stone, Note, *Federal Drug Sentencing—What Was Congress Smoking? The Uncertain Distinction Between "Cocaine" and "Cocaine Base" in the Anti-Drug Abuse Act of 1986*, 30 W. New Eng. L. Rev. 297, 349 (2007) ("[T]he split among the federal circuits should be resolved."); Amanda D. Cary, Comment, *Cocaine Base: Not All It's Cracked Up To Be*, 40 U.C. Dav. L. Rev. 531, 535 (2006) ("This Comment concludes by advocating that the Supreme Court adopt a uniform definition of 'cocaine base' * * *.").

The United States has not sought review of court of appeals decisions limiting "cocaine base" to crack—for example in *Edwards*, 397 F.3d 570 (7th Cir. 2005), or *Brisbane*, 367 F.3d 910 (D.C. Cir. 2004). The only way for the Court to resolve the deep and persisting conflict regarding this important issue, therefore, is to grant a petition filed by a defendant, such as petitioner here.[10]

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[10] The Court previously has denied defendants' petitions touching upon this issue for reasons that do not apply here. In *Higgins*, for example, the defendant sought review not of the correctness of the Sixth Circuit's holding that the "cocaine base" encompassed only crack cocaine (which, of course, favored the defendant), but rather of the court of appeals' separate determination that the jury had found that the defendant possessed the requisite amount of crack cocaine. See 557 F.3d at 396 ("Given the fact that the indictment clearly defines 'cocaine base' as 'crack cocaine' and that the verdict form references the indictment, we conclude that the jury found beyond a reasonable doubt that Higgins possessed crack cocaine.") (footnote omitted).

In *Hollis* and *Ramos*, the defendant sought review of the court of appeals' harmless error determinations. See *Hollis*, 490 F.3d at 1157 ("While an *Apprendi* error occurred in this case, it

The question presented has percolated through all of the court of appeals but one, and the conflict is persistent and deep. To eliminate this disagreement among the lower courts and ensure equal treatment of defendants across the Nation with respect to this important issue, the Court should grant review. As the court below stated, "[b]ecause of the circuit split

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was harmless beyond a reasonable doubt. There was overwhelming and uncontradicted evidence at trial that the substance Hollis distributed was crack."); *Ramos*, 462 F.3d at 333 ("Because there was no objection to the jury charge and to the form of the special verdict [containing references only to cocaine base], for Ramos to succeed in his argument there must have been plain error on the part of the district court.").

And in *United States* v. *Robinson*, 462 F.3d 824 (8th Cir. 2006), the court of appeals did not address the question presented here, observing that the defendant had "admitted during the plea colloquy that his offenses involved 'distribution of cocaine base, that would be crack,'" and that therefore "even if the harsher minimum sentence mandated by 21 U.S.C. § 841(b)(1)(A) for 'cocaine base' offenses is limited to a conviction for distributing the crack form of cocaine base (an issue we need not decide), there was no plain error in sentencing Robinson to that minimum sentence." 462 F.3d at 826.

Finally, the court of appeals in *Anderson* observed that the district court had correctly found that that the defendant "was responsible for the distribution of 6.1 grams of crack cocaine" and relied on that fact in rejecting the defendant's challenge to the imposition of the mandatory minimum sentence, stating that because "the district court found that [the defendant] was found guilty of distributing 6.1 grams of crack cocaine, it is clear that [the defendant] was properly sentenced under the 'cocaine base' provision." 452 F.3d at 85, 87.

Here, by contrast, petitioner has squarely presented the issue to the Court; petitioner's counsel objected to the district court's ruling that "cocaine base" is not limited to crack cocaine; and the evidence does not support a conclusion that petitioner possessed crack cocaine.

this issue does need resolution by the Supreme Court." App., *infra*, 11a-12a.

C. The Statutory Term "Cocaine Base" Encompasses Only Crack Cocaine.

The relevant principles of statutory interpretation all point to the same conclusion: "cocaine base" should be construed to include only crack cocaine.

1. Interpreting "cocaine base" to encompass all cocaine variants that qualify as a base in chemical terms renders parts of the statute meaningless and leads to absurd results.

a. This Court has long recognized its "duty to give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations omitted); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."). Giving "cocaine base" the broad meaning accorded by the court below renders other parts of Section 841(b)(1) meaningless, and therefore violates this principle.

Congress in this provision specified two standards for imposing a ten-year mandatory minimum sentences in cocaine-related offenses: first, if the offense involved "5 kilograms or more of a mixture or substance containing a detectable amount" of "coca leaves" or "cocaine"; second, if it involved "50 grams or more of a mixture or substance" containing coca leaves or cocaine that "contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(ii) & (iii).

"To a scientist, 'cocaine' and 'cocaine base' are synonymous; they both refer to a substance with the formula $C_{17}H_{21}NO_4$." *Booker*, 70 F.3d at 490. And coca leaves contain the same substance. See page 6, *supra*.

Construing "cocaine base" to mean any substance classified chemically as a base therefore renders Congress's first standard for imposing mandatory minimum sentences largely meaningless.

For example, under such a construction, a person possessing 50 grams of coca leaves would be subject to a mandatory minimum of ten years, even though Congress made clear that it intended to place coca leaves in the more lenient sentencing group by dedicating an entire separate provision of the statute—Section 841(b)(1)(A)(ii)(I)—to coca leaves and requiring 5000 grams of coca leaves to trigger the ten-year mandatory minimum.

Applying the broad chemical definition of "base" not only leads to a result contrary to Congress's intent as expressed in the structure of the statute, but it also renders Section 841(b)(1)(A)(ii)(I) superfluous. Because the ten-year minimum would be applied to an offense involving 50 grams of coca leaves based on the "cocaine base" provision, Section 841(b)(1)(A)(iii), there would never be an occasion to apply the specific coca leaf provision.

The same is true of numerous other cocaine-related compounds other than crack cocaine. The statutory term "cocaine" (in Section 841(b)(1)(A)(ii)(II)) also describe substances with the same active ingredient ($C_{17}H_{21}NO_4$) as "cocaine base" (in Section 841(b)(1)(A)(iii)). The statute thus applies the ten-year mandatory minimum to two different thre-

shold quantities of the same underlying chemical substance, rendering meaningless the statutory provision requiring a larger quantity to trigger the mandatory minimum. See *Edwards*, 397 F.3d at 574 (noting "the probable ambiguity if the statutory text alone were considered, given that the same penalty applie[s] to 5 kilograms of 'cocaine,' § 841(b)(1)(A)(ii), as 50 grams of 'cocaine base,' § 841(b)(1)(A)(iii), although the two are chemically the same").

b. One of the few cocaine-related substances for which the broad construction of "cocaine base" does not render the first part of Section 841(b)(1)(A) meaningless is cocaine powder.

But the broad construction produces the illogical result that offenses involving coca leaves and coca paste are punished more harshly than those involving cocaine powder, even though cocaine powder is more potent and more easily consumed than coca leaves. See 1995 U.S.S.C. Report at 16-17 ("Ingesting coca leaves generally is an inefficient means of administering cocaine. * * * Cocaine snorted through the nasal passages appears in the blood three to five minutes after administration, significantly faster than the 30 minutes required for it to reach the bloodstream through ingestion.").

As the D.C. Circuit concluded, "Congress could hardly have intended to apply the enhanced penalties to forms of cocaine base that are not smokable or even consumable without further processing [*i.e.*, coca leaves], while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride." *Brisbane*, 367 F.3d at 913.

"[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part); see also, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). Because broadly construing "cocaine base" produces this absurd consequence, that approach should be rejected by this Court.

2. *Limiting "cocaine base" to crack cocaine is consistent with the provision's plain language.*

Interpreting "cocaine base" to mean a specific type of cocaine is not just consistent with the statutory structure and with the principle that congressional enactments should be construed so as to avoid absurd results; it is also consistent with the language Congress used in drafting the provision.

When Congress enacted the ADAA in 1986, "crack" cocaine was a relatively recent phenomenon, and that term was considered slang usage. See *Shaw*, 936 F.2d at 415-16. Indeed, the House Committee on the Judiciary issued a report in 1986 urging passage of a resolution calling for a conference on drug abuse. That report explained:

> In the summer of 1986, the wave of the cocaine abuse epidemic which had been growing for a decade began to crash upon American cities in the form of "crack." Crack, the street name for cocaine freebase, a preparation of cocaine hydrochloride and sodium bicarbonate, can be smoked and consequently produces intense moments of the cocaine "rush."

Id. (quoting H.R. Rep. No. 99-846, 99th Cong., 2d Sess. 4 (1986)).

Given this context, the term "cocaine base" is most logically construed to refer to the types of smokeable cocaine used for the "freebasing" that was the focus of Congress's concern. At the minimum, the term is ambiguous and, in view of the consequences of applying the broader, chemical construction of the term—in particular the disruption of Congress's scheme, rendering meaningless other provisions of the same statute, as well as the absurd results—the narrower meaning should be adopted by this Court.

3. The legislative history demonstrates that Congress intended to single out crack cocaine for harsher punishment.

The court below recognized that crack cocaine was the "main focus of Congress's concern" in passing the ADAA. App., *infra*, 10a. Indeed,

> [i]n 1986, Congress was concerned about the emergence of a new, smokable form of cocaine that was more dangerous than powder cocaine, less expensive, and highly addictive. * * * [I]t is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine.

Booker, 70 F.3d at 493-94. "[W]hen Congress adopted the [ADAA], it meant to deal with what it saw as a crack epidemic sweeping the country." *Hollis*, 490 F.3d at 1156; see also *Higgins*, 557 F.3d at 395 ("[I]t is clear that Congress intended that the enhanced penalties for 'cocaine base' would apply to crimes in-

volving 'crack cocaine.'"); page 8, *supra* (discussing legislative history).

The court in *Edwards* correctly concluded after "[c]anvassing the legislative history" that "it is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine." 397 F.3d at 574 (internal quotations omitted).

4. The rule of lenity supports interpreting "cocaine base" to encompass only crack cocaine.

When interpreting a criminal statute, "where text, structure, and history fail to establish that the Government's position is unambiguously correct[,]" the rule of lenity requires that the ambiguity be resolved in the defendant's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). This rule applies to statutes defining criminal penalties as well as to statutes defining criminal offenses: "'the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.'" *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)).

Here, where the meaning of "cocaine base" is ambiguous at best, and there is no clear indication that Congress intended the mandatory minimum sentences to be triggered by lesser amounts of cocaine other than crack cocaine, the rule of lenity mandates adoption of the narrower construction of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 08-2101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANTZ DEPIERRE,
Defendant-Appellant.

Appeal from the United States District Court for the District of Massachusetts. No. 1:06-cr-10058-DPW-1 – **Douglas P. Woodlock**, *Judge*.

ARGUED FEBRUARY 4, 2010 – DECIDED MARCH 17, 2010

Before LYNCH, BOUDIN, and HOWARD, *Circuit Judges*.

BOUDIN, Circuit Judge.

After selling drugs on two occasions to a government informant, Frantz DePierre was tried and convicted of distributing cocaine in powder form (in the first sale), 21 U.S.C. § 841(a)(1) (2006), and of distributing 50 grams or more of cocaine base (in the second), *id.*, which carries a ten-year minimum sentence, *id.* § 841(b)(1)(A)(iii). In reviewing DePierre's appeal, we begin with a brief overview of events, add-

ing details in the discussion of individual claims of error.

In January 2005, a confidential informant ("CI") working with government agents received a call from DePierre. According to the CI's later trial testimony, DePierre offered to sell the CI crack cocaine. The CI, himself a former drug dealer, had been working with agents to investigate firearm and drug sales in the Haitian community in and around Boston, and the CI and DePierre had had earlier contacts. In a follow-up recorded phone call by the CI, primarily concerning proposed gun purchases, DePierre confirmed that he had the "cookies," a reference to crack according to the CI.[1]

The two men then agreed on a purchase by the CI of a quantity of powder cocaine, although DePierre confirmed that he could "[c]hef [it] up," meaning to cook the powder into crack. *See United States v. Santiago*, 566 F.3d 65, 68 (1st Cir. 2009) (noting the meaning of "chef it up"). In early February 2005, the powder sale was completed, but the federal agents decided to invite a transaction involving crack, and further discussions between the CI and DePierre ensued, with the CI pressing for crack rather than powder and DePierre confirming that he could provide crack. In March, DePierre sold the CI 55.1 grams of crack.

Following indictment, DePierre pled to one firearms charge, three other firearms charges were dis-

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[1] *See generally* Office of National Drug Control Policy, Street Terms: Drugs and the Drug Trade, Crack Cocaine, http://www.whitehousedrugpolicy.gov/streetterms/ByType.asp?intTypeID=2 (last visited February 25, 2010) (listing "cookies" as a slang term for crack cocaine).

missed, and trial followed solely on the two drug charges. Without denying the two sales, DePierre urged he had been entrapped, principally as to the sale of cocaine base. The entrapment defense was submitted to the jury, which after a four-day trial rejected the defense and convicted DePierre on both charges. The judge sentenced DePierre to ten years in prison, the statutory minimum for a sale of 50 or more grams of cocaine base. DePierre now contests only the cocaine base conviction and the ultimate sentence, albeit on several different grounds.

DePierre's main contention on appeal relates to the distinction between crack and cocaine base, critical at sentencing, but we start with DePierre's conviction. Here, he claims that the judge misinstructed the jury on his substantive entrapment defense and, relatedly, that the judge erred at sentencing in rejecting DePierre's counterpart claim that the government engaged in sentencing factor manipulation. Both arguments rest on the premise that DePierre sought only to sell powder cocaine but was wrongfully induced to sell crack.

Although DePierre does not say that the evidence compelled the jury to accept the defense, a description of the evidence on both sides provides context for the misinstruction claim. DePierre had in his favor the facts that he initially delivered powder cocaine and that further contacts had to be made by the CI before crack was procured. One of the government agents testified candidly that he sent the CI back to renew his efforts precisely in order to see whether DePierre could be drawn into a sale of crack, carrying with it the prospect of a higher sentence.

It may be this express admission that prompted the judge to submit to the jury the entrapment claim,

an obligation that exists only where there is record evidence that "fairly supports" the claim. *United States v. Rodriguez*, 858 F.2d 809, 812-14 (1st Cir. 1988). Whether this is such a case may be debated—there is no rule that the agent must stop with the first crime—but it is hard to fault the trial judge for avoiding the risk that an appellate court might say later that the issue should have been left to the jury.

Under the precedents, once the defendant makes a preliminary showing, the burden shifts to the government to prove beyond a reasonable doubt one of two things, *either* of which defeats the defense: that the government did not wrongfully induce the accused to engage in criminal conduct *or* that the accused had a predisposition to engage in such conduct absent the inducement. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Rodriguez*, 858 F.2d at 812, 814-15. Given the burden-shifting, the term "defense" may be thought to understate the government's full burden.

However, in practical terms the defense is difficult for the defendant because the threshold that must be met to show *wrongful* inducement is a high one. By their nature, "stings" and other such long-permitted operations of law enforcement do "induce" crimes, if that word is used in its lay sense. But it is settled that only *undue* pressure or encouragement are forbidden. *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996); *United States v. Acosta*, 67 F.3d 334, 337-38 (1st Cir. 1995). The reasons, *see generally United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994) (Breyer, C.J.), are too familiar to require repetition.

In this instance, the jury could easily reject the entrapment defense for lack of impropriety, because

of propensity or both. If the CI were credited, DePierre's initial call *was* a proposal to sell crack; DePierre made clear that he could cook the powder into crack if desired; and although the CI made multiple phone calls to DePierre to set-up the two drug sales, no evidence indicates that the agents or the CI applied any undue pressure to secure the crack or even had to overcome resistance. The government's desire to establish the more serious crime may offend the fastidious, but inviting crime is the essence of sting operations. *Cf. United States v. Terry*, 240 F.3d 65, 66-70 (1st Cir. 2001); *United States v. Egemonye*, 62 F.3d 425, 427-28 (1st Cir. 1995).

Still, DePierre was entitled to have any instruction given be a proper one. He did not object to the original instruction nor to a summary definition thereafter given at the jury's request; but when the jury then asked for more guidance, the judge provided a written summary of the inducement and predisposition criteria. DePierre objected to the written summary's use of the word "improperly" to qualify the character of the government conduct required. The judge's summary said that the government must prove:

> *One*, that the cooperating informant did not improperly persuade or talk the defendant into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as improperly persuading him, but excessive pressure by the cooperating informant can be improper; OR
>
> *Two*[,] that the defendant was ready and willing to commit the crime without any improper persuasion from the cooperating individual.

Courts have had difficulty tailoring a useful abstract definition of what is wrongful inducement—this is equally true of "reasonable doubt," *see United States v. Whiting*, 28 F.3d 1296, 1303-04 (1st Cir. 1994)—and have regularly resorted both to examples and to adjectives to illuminate the concept. In the original instruction in this case, to which no objection was taken, the district judge said, among other things, that entrapment requires "some form of excessive pressure or some form of undue sympathy," and the court gave examples of permissible conduct to illustrate the difference between what was and was not entrapment.

There was nothing wrong in using the term "improper," and a number of our own decisions have done so. Thus, in *Santiago*, we said that the "inducement" prong requires "a degree of pressure or . . . other tactics that are improper." 566 F.3d at 58; *accord Acosta*, 67 F.3d at 337. Apart from attacking the word "improper," DePierre merely complains that the summary did not include examples. But the court earlier had given examples, and taking the charge on entrapment as a whole—the usual test, *United States v. Taylor*, 54 F.3d 967, 976 (1st Cir. 1995)—it fairly explained the concept to the jury.

This brings us to DePierre's related claim of sentencing factor manipulation, which occurs when the government "improperly enlarge[s] the scope or scale of [a] crime" to secure a longer sentence than would otherwise obtain. *United States v. Vasco*, 564 F.3d 12, 24 (1st Cir. 2009) (quoting *United States v. Fontes*, 415 F.3d 174, 180 (1st Cir. 2005) (alterations in original)); *accord United States v. Montoya*, 62 F.3d 1, 3-4, (1st Cir. 1995). This claim and the entrapment defense have evident similarities; the

claims may closely overlap in a single case (as they do here), and, confusingly, the term "entrapment" is sometimes used in describing the manipulation claim. *See United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992) (noting the nomenclature problem).[2]

But the entrapment defense in federal courts dates back to the 1930s, *see Sorrells v. United States*, 287 U.S. 435 (1932); 2 LaFave, *Substantive Criminal Law* § 9.8(a), at 88-89 (2d ed. 2003), creates a jury issue and can result in an acquittal, *see Acosta*, 67 F.3d at 337-38. Sentencing factor manipulation is a more recent concept in this circuit (and some others) by which the judge, not the jury, can adjust a sentence downward if the judge concludes that the government has improperly enlarged the scope or scale of the crime to secure a higher sentence. *See Montoya*, 62 F.3d at 3-4; *Connell*, 960 F.2d at 194-97. The defendant bears the burden of making such a showing. *Jaca-Nazario*, 521 F.3d at 57.

For sentencing factor manipulation, impropriety is the main focus, although predisposition is sometimes described as negating the claim, *Jaca-Nazario*, 521 F.3d at 58-59; *United States v. Gibbens*, 25 F.3d 28, 31 & n.3 (1st Cir. 1994), and in this circuit the threshold is very high, *e.g.*, *United States v. Richard-*

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[2] Adding to the confusion, this circuit uses the phrases "sentencing factor manipulation" and "sentencing entrapment" interchangeably, *United States* v. *Jaca-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008), but other circuits vary, *e.g.*, *United States* v. *Garcia*, 79 F.3d 74, 75 (7th Cir. 1996) (distinguishing between government inducement of a more serious crime and conduct merely increasing the defendant's sentence); *United States* v. *Jones*, 18 F.3d 1145, 1152-53 (4th Cir. 1994) (sentencing entrapment implicates defendant's predisposition but manipulation does not).

son, 515 F.3d 74, 86 n.8 (1st Cir. 2008) (requiring "an extreme and unusual case" such as "'outrageous and intolerable pressure' or 'illegitimate motive on the part of the agents'" (quoting *Montoya*, 62 F.3d at 4)); *Jaca-Nazario*, 521 F.3d at 58 (requiring "extraordinary misconduct").

This comparatively high threshold owed something to concerns about undermining detailed statutory and guideline provisions designed to control variations in sentencing and, conversely, perhaps to a perception that ordinary entrapment doctrine has a close relationship to drawing the line between guilt and innocence, where courts are especially protective. *Montoya*, 62 F.3d at 4; 2 LaFave, *supra* § 9.8(b), at 95 n.48 (discussing circuit case law). Under our precedents, the adjectives are part of the doctrine.

In all events, there was no wrongful manipulation here under any phrasing of the standard. This is patent if the trial judge believed the CI's statement that DePierre himself offered crack in the first conversation; but in any case, the evidence already discussed shows that the CI exerted no real pressure, let alone undue pressure, to secure the sale of crack, which DePierre showed no hesitation in providing. We add that manipulation decisions by the sentencing judge are reviewed with deference, *Jaca-Nazario*, 521 F.3d at 57, but given the evidence, no deference is needed to sustain the decision here.

This brings us to DePierre's main claim. The drug statute requires that to generate the mandatory minimum ten-year sentence, the sale or sales comprise 50 grams or more of "cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii). The jury was instructed to determine the nature and amount of the drug sold because these facts raise the statutory *maximum* for drug

distribution and trigger the requirements of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). DePierre's contention, which was preserved in the district court, is that the statute should be read to apply only to that form of cocaine base called crack, a position that some circuits have accepted.[3]

The statutory offense is defined as the sale (or other defined acts) of any amount of any drug comprising "a controlled substance," 21 U.S.C. § 841(a), and the distinctions as to the type of controlled substance and the amount are primarily a concern of the statutory provisions defining "[p]enalties," *id.* § 841(b); *United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003). Because the sale of any form of cocaine in any amount permits a maximum sentence of 20 years, 21 U.S.C. § 841(b)(1)(C), DePierre's sentence would not have been an *Apprendi* violation regardless of whether the drug was crack or some other form of cocaine. *United States v. Lizardo*, 445 F.3d 73, 89-90 (1st Cir. 2006).

However, the character of the drug could affect the judge's choice of sentences and, if the judge had wrongly classified the drug here at issue as one for which Congress had aimed at higher sentences, there might still be an error prejudicial to the defendant. But the instruction given by the judge accords with how this circuit has read the statutory term "cocaine

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[3] Circuits limiting "cocaine base" to only crack (or to crack and other types of smokable cocaine base) include *United States v. Higgins*, 557 F.3d 381, 394-96 (6th Cir. 2009); *United States v. Edwards*, 397 F.3d 570, 575-77 (7th Cir. 2005); *United States v. Vesey*, 330 F.3d 1070, 1073 (8th Cir. 2003); *United States* v. *Hollis*, 490 F.3d 1149, 1155-57 (9th Cir. 2007); *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377-78 (11th Cir. 1994); and *United States* v. *Brisbane*, 367 F.3d 910, 912-14 (D.C.Cir. 2004).

base," so there was no error in the instruction or in the verdict confirming that the drug was cocaine base within the meaning of the statute.

Given the background supplied by *United States v. Robinson*, 144 F.3d 104, 108 (1st Cir. 1998), it is enough to say here that the rock-like substance known as crack is the most familiar form of cocaine base, while powder cocaine is not cocaine base but rather is a salt, most commonly cocaine hydrochloride. *Id.* Although chemically similar (crack is made by cooking the powder form), Congress deemed crack far more dangerous in its effects on users and prescribed higher mandatory minimum and maximum sentences for sale of cocaine base than for other forms of cocaine. *United States v. Manzueta*, 167 F.3d 92, 94 (1st Cir. 1999).

DePierre, like others before him, argues that the statute although referring explicitly to "cocaine base" should be judicially restricted to only the specific form of cocaine base known as crack, which (admittedly) was the main focus of Congress's concern. As it happens, some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack; but to rely on that would needlessly raise an evidentiary issue that DePierre contests and also raise doubts about the continued vitality of binding circuit precedent as to the meaning of the statute.

This circuit (along with a number of others) has read the statute according to its terms and held that "cocaine base" refers to "all forms of cocaine base, including but not limited to crack cocaine." *United States v. Anderson*, 452 F.3d 66, 86-87 (1st Cir.

2006).[4] Thus, the district court's instructions and the jury verdict accorded with our precedent, and the mandatory minimum sentence was properly imposed. This panel cannot overrule settled circuit precedent absent supervening authority or some other singular event. *Anderson*, 452 F.3d at 86.

DePierre says that *Kimbrough v. United States*, 552 U.S. 85 (2007), discussing the disparity between powder cocaine and crack sentences, requires us to reconsider our view. But *Kimbrough* was concerned with sentencing guidelines that do use the term "crack," and nothing it said involved a construction of the phrase "cocaine base" that triggers the statutory minimum sentence. *Kimbrough* uses the term "cocaine base" only once, calling "[c]rack cocaine . . . a type of cocaine base." *Id.* at 94.

Kimbrough does also say that the statutory mandatory minimums under 21 U.S.C. § 841 that are at issue here apply to crack, 552 U.S. at 96, and that the statute "criminaliz[es] the manufacture and distribution of crack cocaine," *id.* at 91, but these correct observations do not resolve the question whether the statutory minimums apply only to crack or rather to all forms of cocaine base. Because of the circuit split this issue does need resolution by the

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[4] In this circuit, see *United States v. Medina*, 427 F.3d 88, 92 (1st Cir. 2005); *United States v. Richardson*, 225 F.3d 46, 49 (1st Cir. 2000); and *United States v. Lopez-Gil*, 965 F.2d 1124, 1134-35 (1st Cir. 1992) (opinion on rehearing). For other circuits of the same view, see *United States v. Jackson*, 968 F.2d 158, 162-63 (2d Cir. 1992); *United States v. Barbosa*, 271 F.3d 438, 466-67 (3d Cir. 2001); *United States v. Ramos*, 462 F.3d 329, 333-34 (4th Cir. 2006); *United States v. Butler*, 988 F.2d 537, 542-43 (5th Cir. 1993); and *United States v. Easter*, 981 F.2d 1549, 1558 & n.7 (10th Cir. 1992).

Supreme Court (at least in a case where its resolution matters); but *Kimbrough* does not address the issue, let alone decide it in DePierre's favor.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
versus
FRANTZ DEPIERRE

DOCKET NUMBER 06-CR-10058
UNITED STATES COURTHOUSE
BOSTON, MASSACHUSETTS
APRIL 2, 2008

Excerpt from trial transcript, page 516, line 19 through page 517, line 1:

THE COURT: Okay. Well, I guess where I come out is that the question is cocaine base; that is, the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine, and, as I recall Rita (phonetic), it was a question of whether it was chunky or plain * * * as a substance.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
versus
FRANTZ DEPIERRE

DOCKET NUMBER 06-CR-10058
UNITED STATES COURTHOUSE
BOSTON, MASSACHUSETTS
AUGUST 8, 2008

Excerpt from transcript of sentencing hearing, pages 39-46

THE COURT: That then leads me to the minimum mandatory. I'm not saying anything that any other judge, I think, would disagree with to say that minimum mandatories are a crude weapon in the war against crime because they don't permit a nuanced response that takes into consideration all of the factors that Section 3553 requires me to consider, but they are the decision that Congress has made because of whatever political considerations in the Congress from time to time to get into the micromanaging of sentencing judgments by judges.

I turn then to the question of the Guidelines, 121 months to 151 months. Those are a series of guidelines a year -- or a month more than the minimum mandatory, and they're reflective of the way in

which the Sentencing Commission itself views this kind of activity. That is, dealing in crack cocaine.

But, of course, I'm in a position to depart from or vary from the Sentencing Guidelines because of the Supreme Court's recent cases, Gall and Kimbrough, to use the classic -- the principal ones, if I think that the Guideline itself doesn't serve the larger purposes of Section 3553.

So, now I turn to Section 3553.

* * * * *

Now, ultimately my responsibility is to fashion that sentence which is sufficient, but involves no more than is necessary to serve all of the issues -- all of the considerations of Section 3553.

I'm satisfied that the minimum mandatory, which is the minimum that I can impose, does that. In fact, left to my own devices, I would go along with the minimum mandatory in this particular case. I cannot. So, the sentence will be 120 months in prison.

* * * * *

I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation that Mr. Masferrer made than it is to that which the government made, but I don't have the choices here. So, under the circumstances, I've given you the lowest sentence in terms of incarceration that I can * * *.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANTZ DEPIERRE,
Defendant.

CRIMINAL NO. 06-10058-DPW

VERDICT

1. AS TO COUNT ONE

We, the jury, find the Defendant Frantz Depierre Guilty

(Answer "Not Guilty" or "Guilty")

2. AS TO COUNT TWO

A. We, the jury, find the Defendant Frantz Depierre Guilty with respect to the distribution of a controlled substance.

(Answer "Not Guilty" or "Guilty")

If you have answered "Guilty" to Question 2.A., Answer Question 2.B.

B. Was the controlled substance you have found distributed in answer to Question 2.A., cocaine base? Yes

(Answer "NO" or "YES.")

If you have answered "NO" to Question 2.B., return your verdict; if you have answered "YES," answer Question 2.C.

C. Did the defendant Frantz Depierre transfer over 50 grams of cocaine base? Yes

(Answer "NO" or YES.")

If you have answered "YES" to Question 2.C., return your verdict; if you have answered "NO," answer Question 2.D.

D. Did the defendant Frantz Depierre transfer over 5 grams of cocaine base? ___

(Answer "NO" or "YES.")

4/3/08 s/s
DATE FOREPERSON

OPPOSITION BRIEF

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(2)

Supreme Court, U.S.
FILED
AUG 16 2010
OFFICE OF THE CLERK

No. 09-1533

In the Supreme Court of the United States

FRANTZ DEPIERRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was correctly sentenced under the provisions of 21 U.S.C. 841(b) that govern offenses involving "cocaine base" as opposed to other forms of cocaine.

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In the Supreme Court of the United States

No. 09-1533

FRANTZ DEPIERRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 599 F.3d 25.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of distribution of powder cocaine, in violation of 21 U.S.C. 841(a)(1), and distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1)

and 841(b)(1)(A)(iii).[1] He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Pet. App. 1a, 15a; C.A. R. App. 25-26, 28 (R.A.). The court of appeals affirmed. Pet. App. 1a-12a.

1. Under 21 U.S.C. 841(b)(1), the penalties for controlled-substance offenses identified in 21 U.S.C. 841(a) vary according to the type and quantity of controlled substance involved. Section 841(b)(1)(A)(ii) provides for a sentence of between ten years and life for a defendant who commits an offense involving five kilograms or more of a mixture or substance containing a detectable amount of "coca leaves," "cocaine, its salts, optical and geometric isomers, and salts of isomers," or "ecgonine, its derivatives, their salts, isomers, and salts of isomers." Section 841(b)(1)(A)(iii) provides for the same sentence for a defendant who commits an offense involving 50 grams or more of "a mixture or substance described in clause (ii) which contains cocaine base." Similarly, Section 841(b)(1)(B)(iii) provides for a sentence of between five years and 40 years for a defendant who commits an offense involving five grams or more of cocaine base, while 500 grams or more of other forms of cocaine are required under Section 841(b)(1)(B)(ii).[2]

2. In January 2005, petitioner called a man who proved to be a confidential informant (CI) for the gov-

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[1] Before trial, petitioner pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k), and three other firearms charges were dismissed. Pet. App. 2a-3a.

[2] Congress recently passed legislation amending Section 841(b)(1)(A)(iii) to require 280 grams of cocaine base (as opposed to 50 grams) to trigger the ten-year mandatory minimum sentence, and Section 841(b)(1)(B)(iii) to require 28 grams of cocaine base (as opposed to five grams) to trigger the five-year mandatory minimum sentence. See Fair Sentencing Act of 2010, S. 1789, 111th Cong. § 2(a) (enacted).

ernment and offered to sell him crack cocaine. In a follow-up call initiated by the CI, petitioner confirmed that he had "the cookies," a slang term for crack cocaine, but also used the word "riggedy," a slang term for powder cocaine. The CI asked petitioner if he could "chef [the cocaine] up," meaning to cook it into crack, and petitioner said he would. Gov't C.A. Br. 4-5 (brackets in original); Pet. App. 2a.

Despite the CI's request that petitioner "chef up" the cocaine, petitioner sold him only powder cocaine at their first meeting on February 8, 2005. During subsequent conversations, the CI specified that next time he wanted crack cocaine, not powder cocaine. The CI met with petitioner a few days later, but petitioner could not sell the CI crack at that time because he had left the equipment needed for cooking powder into crack at his girlfriend's house. Gov't C.A. Br. 5-6.

In March 2005, petitioner and the CI continued to discuss another drug deal, with the CI asking for "flago," another slang term for crack cocaine, stating that he wanted petitioner to "chef it," and emphasizing that he did not want cocaine powder. On April 5, 2005, petitioner sold the CI two bags of drugs for $1800. Gov't C.A. Br. 6-8. The bags contained an off-white colored chunky substance. Gov't C.A. Supp. App. 298, 336. Laboratory testing determined that the bags contained cocaine base and had a total weight of 55.1 grams, with a purity level of 40%. Pet. App. 2a; Gov't C.A. Br. 8; Gov't C.A. Supp. App. 331-335. Inositol was found mixed in the substance; sodium bicarbonate was not found in detectable amounts. Gov't C.A. Supp. App. 342-345.

3. Petitioner went to trial on two drug counts: one charging distribution of powder cocaine, and one charg-

ing distribution of 50 grams or more of cocaine base. Pet. App. 1a-3a.

a. At trial, petitioner asked the district court to instruct the jury that to find him guilty of distribution of cocaine base it had to find beyond a reasonable doubt that petitioner "distributed the form of cocaine base known as crack cocaine. 'Crack' is a street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form. * * * Chemical analysis cannot establish a substance as crack because crack is chemically identical to other forms of cocaine base, although it can reveal the presence of sodium bicarbonate, which is usually used in the processing of crack." R.A. 53-54. At the instructions conference, petitioner reiterated his position that the reference to "cocaine base" in 21 U.S.C. 841(b)(1)(A)(iii) required the jury to find that he possessed "crack cocaine." Gov't C.A. Supp. App. 358.

The district court rejected petitioner's proposed instruction, holding, based on First Circuit precedent, that cocaine base is "the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine." Gov't C.A. Supp. App. 359. The court instructed the jury that "the statute that's relevant asks about cocaine base. * * * Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." *Id.* at 428. The jury convicted petitioner on both counts, and found that he had distributed 50 grams or more of "cocaine base." Pet. App. 1a; Verdict 2.

b. The Presentence Investigation Report (PSR) calculated petitioner's offense level under Sentencing Guidelines § 2D1.1 (2006) based, in part, on the determi-

nation that petitioner was responsible for 55.1 grams of "cocaine base." PSR ¶¶ 21-22. For the purpose of that Guidelines provision, "[c]ocaine base" is defined to mean "crack," *i.e.*, "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." Sentencing Guidelines § 2D1.1 (Drug Quantity Table, Note D). Under the Drug Equivalency Table (Sentencing Guidelines § 2D1.1 (Note E)), one gram of cocaine is equal to 200 grams of marijuana, whereas one gram of "cocaine base" (*i.e.*, crack cocaine) is equal to 20 kilograms of marijuana (or 20,000 grams). PSR ¶ 22. The PSR held petitioner accountable for 61.7 grams of cocaine (the equivalent of 12.34 kilograms of marijuana) and 55.1 grams of crack cocaine (the equivalent of 1102 kilograms of marijuana), for a total marijuana equivalency of 1114.34 kilograms. *Ibid.* Based on that calculation, and after a reduction under Application Note 10(D)(ii), petitioner's offense level was 30. *Id.* ¶¶ 23, 24, 29, 46. Combined with a criminal history category of III, petitioner's advisory guidelines range was 121 to 151 months of imprisonment. *Id.* ¶¶ 55, 93. Petitioner raised no objection to the calculation or to the advisory guidelines range.

At sentencing, the district court agreed that 121 to 151 months was the applicable advisory guidelines range based on petitioner's offense—"dealing in crack cocaine." Sent. Tr. 39-40; *id.* at 41 (acknowledging that petitioner got "himself into the 121 to 151 Guideline" by "deal[ing] in crack cocaine and guns"). Petitioner again raised no objection. The court ultimately sentenced petitioner to the statutory mandatory minimum sentence of 120 months of imprisonment. *Id.* at 43.

4. The court of appeals affirmed. Pet. App. 1a-12a. As relevant here, the court recognized that some courts of appeals had concluded "that the statute should be read to apply only to that form of cocaine base called crack." *Id.* at 9a & n.3. Although the court of appeals noted that "some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack," the court did not rely on that as a basis for decision. *Id.* at 10a. Instead, the court of appeals concluded that the district court correctly instructed the jury and imposed the mandatory minimum sentence based on First Circuit precedent holding that cocaine base referred to "all forms of cocaine base, including but not limited to crack cocaine." *Id.* at 10a-12a. The court also suggested that the conflict among the courts of appeals on this "issue does need resolution by the Supreme Court"—"at least in a case where its resolution matters." *Id.* at 11a-12a.

ARGUMENT

Petitioner contends (Pet. 13-27) that the term "cocaine base" in Section 841(b)(1) is limited to "crack" and that, as a result, he was not subject to a mandatory ten-year term of imprisonment. The court of appeals correctly rejected that claim. And although there is a circuit conflict about the meaning of the term "cocaine base" in Section 841(b)(1), this case would not be an appropriate one in which to resolve that conflict.

1. The court of appeals correctly rejected petitioner's claim that 21 U.S.C. 841(b)(1)(A)(iii) reaches only crack. See Pet. App. 10a-11a & n.4 (citing, *inter alia*, *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir.), cert. denied, 549 U.S. 1068 (2006)). Although the statute does not define "cocaine base," it is "a chemical term

* * * whose meaning is undisputed in the scientific community." *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir.), cert. denied, 506 U.S. 1024 (1992). "Cocaine base" is defined by the formula $C_{17}H_{21}NO_4$, and is readily identifiable by chemical analysis. It is distinct from cocaine hydrochloride (powder cocaine), and the two substances have "different solubility levels, different melting points and different molecular weights." *Id.* at 161. "Crack" is "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate[] and usually appearing in a lumpy rocklike form." Sentencing Guidelines § 2D1.1 (2006) (Drug Quantity Table, Note D); see *ibid.* (defining "[c]ocaine base" as "crack" for purposes of the advisory Sentencing Guidelines).

Although the legislative history reflects that Congress "was concerned with the scourge of 'crack'" (*Jackson*, 968 F.2d at 162) when it enacted the enhanced penalties for "cocaine base" in Section 841(b)(1), nothing in the statute suggests that Congress used the term "cocaine base" to refer only to a certain form of that substance. Rather "[t]he only proper inference [to] draw from Congress' use of the chemical term 'cocaine base,' without explanation or limitation, is that [Congress] intended the term to encompass all forms of cocaine base." *United States* v. *Barbosa*, 271 F.3d 438, 466 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002); see *Jackson*, 968 F.2d at 161 (stating that "[w]here Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate'" (brackets in original) (quoting *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201 (1974)). In addition, "nothing in the legislative history [of 21 U.S.C. 841(b)(1)] indicates that Congress intended 'co-

caine base' to be limited to crack cocaine." *United States* v. *Easter*, 981 F.2d 1549, 1588 n.7 (10th Cir. 1992), cert. denied, 508 U.S. 953 (1993). Section 841(b)(1) thus "regulates exactly what its terms suggest: the possession of any form of 'cocaine base.'" *United States* v. *Medina*, 427 F.3d 88, 92 (1st Cir. 2005), cert. denied, 552 U.S. 880 (2007).

2. Petitioner correctly notes (Pet. 13-17) that there is a conflict in the circuits on whether the term "cocaine base" in Section 841(b)(1) reaches forms of cocaine base other than crack. In addition to the First Circuit, five other circuits have held that the statutory term covers all forms of cocaine base. See *Jackson*, 968 F.2d at 161-162 (2d Cir.); *Barbosa*, 271 F.3d at 467 (3d Cir.); *United States* v. *Ramos*, 462 F.3d 329, 333-334 (4th Cir.), cert. denied, 549 U.S. 1065 (2006); *United States* v. *Butler*, 988 F.2d 537, 542-543 (5th Cir.), cert. denied, 510 U.S. 956 (1993); *Easter*, 981 F.2d at 1588 (10th Cir.). Four circuits, by contrast, have held that only crack qualifies as "cocaine base" for purposes of Section 841(b)(1). See *United States* v. *Higgins*, 557 F.3d 381, 395 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009); *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007), cert. denied, 552 U.S. 1166 (2008); *United States* v. *Edwards*, 397 F.3d 570, 576 (7th Cir. 2005); *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377-378 (11th Cir. 1994). The D.C. Circuit has held that "cocaine base" as used in Section 841(b)(1) does not encompass all forms of cocaine base, but it has not decided whether the term is limited only to crack. See *United States* v. *Brisbane*, 367 F.3d 910, 914 ("'[C]ocaine base' could mean only crack. * * * But this approach may be too narrow."), cert. denied, 543 U.S. 938 (2004). The Eighth Circuit has not yet decided the issue. See *United States* v. *Robinson*, 462

F.3d 824, 826 (2006) (explaining that the court "need not decide" the question), cert. denied, 549 U.S. 1172 (2007); *United States* v. *Williams*, 557 F.3d 556, 562-563, cert. denied, 130 S. Ct. 237 (2009).

3. This case would not be an appropriate vehicle for resolving the conflict among the courts of appeals on whether the term "cocaine base" in 21 U.S.C. 841(b)(1) is limited to crack, because the arguments and evidence at trial and the district court's findings at sentencing show that the substance in this case was, in fact, crack.[3] In his opening statement, petitioner's counsel specifically argued that the government had entrapped petitioner into selling crack. See, *e.g.*, Gov't C.A. Supp. App. 18 ("you're going to hear it's not right for the Government to get you to sell crack cocaine when you were never going to do that"); *id.* at 19 ("what you'll see is an experienced, manipulative drug dealer, [the CI], encouraging [petitioner] to sell him crack; specifically, crack cocaine."). In his questions at trial, petitioner's counsel again characterized the substance at issue as crack cocaine. See, *e.g.*, *id.* at 115 ("When you met back up at the staging area, you took the crack cocaine from [the CI]?"); *id.* at 210 ("And you eventually get some crack from [petitioner]?").

The evidence at trial overwhelmingly confirmed counsel's implicit concession. The CI and petitioner specifically discussed the sale of crack on multiple occasions,

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[3] Petitioner acknowledges (Pet. 20 n.10) that this Court has often and recently denied certiorari on this question, and his efforts to distinguish those cases fall short. The Court has denied certiorari in cases where resolution of the circuit conflict would not lead to a different result. See, *e.g.*, *Anderson*, 549 U.S. 1068 (2006) (cited at Pet. 21 n.10); *Evans* v. *United States*, 129 S. Ct. 452 (2008) (Gov't Br. at 6, *Evans*, *supra* (No. 08-5001)). The same is true in this case.

see Gov't C.A. Supp. App. 28, 52, 98-99, 110-114, 124-125, 149-150, 155-158, 165-166, 173-174, but never mentioned freebase, coca paste, or coca leaves. *Id.* at 245 ("Q. You were always clear with him: I want crack, right? A. That's correct."). The case agent testified that after the April 5, 2005 meeting with petitioner the CI provided him with "two separate ounces of crack cocaine." *Id.* at 51, 54. The CI testified that the substance he received from petitioner was crack cocaine. *Id.* at 183-188, 269. The task force agent who received the substance from the CI testified that it was "an off-white colored chunky substance." *Id.* at 298. That physical description is consistent with the characteristics that courts adopting petitioner's proposed definition of "cocaine base" for purposes of 21 U.S.C. 841(b)(1) have identified as evidence of crack cocaine. See *Edwards*, 397 F.3d at 574 (describing crack as a cocaine mixture boiled into a "rocklike substance"); *Munoz-Realpe*, 21 F.3d at 377 (describing crack as usually appearing "in a lumpy, rocklike form"); see also Sentencing Guidelines § 2D1.1 (Drug Quantity Table, Note D) (describing "crack" as "usually appearing in a lumpy, rocklike form").[4]

Consistent with the evidence at trial, the PSR characterized the substance at issue as crack cocaine (PSR ¶¶ 21-22), and calculated petitioner's advisory guidelines range based on that characterization. Petitioner did not challenge that characterization at sentenc-

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[4] Petitioner's claim (Pet. 11 n.5) that the evidence "would not have supported a finding that [his] offense involved crack cocaine" because "baking soda would have been present if the substance had been crack cocaine" is simply wrong. Although crack is usually prepared with baking soda, any weak base can be used and thus the presence of baking soda is not necessary to support a finding that a substance is crack. See *United States* v. *Gonzalez*, 608 F.3d 1001, 1004 (7th Cir. 2010).

ing, nor did he object to the advisory guidelines range. To the contrary, in his sentencing memorandum, petitioner argued that he "relented to the cooking of crack cocaine upon the [CI's] insistence," and criticized the government for "getting [him] to sell crack cocaine." R.A. 57-58, 60. During the sentencing hearing, both the district court and petitioner's counsel repeatedly referred to the substance as "crack cocaine." See, *e.g.*, Sent. Tr. 17 (Court: "he, in fact, delivered crack cocaine."); *id.* at 19 (Petitioner's counsel: "the only reason he was providing crack cocaine * * * is because the government * * * insisted on that."); *id.* at 28 (Petitioner's counsel: "they get him to sell 50 grams of crack cocaine."); *id.* at 39 (Court: "There's nothing surprising about his delivery of crack cocaine. He said he could do it and he did ultimately."). And, before sentencing petitioner, the district court adopted the PSR's advisory guidelines range of 121 to 151 months—based on a finding that petitioner had been "dealing in crack cocaine." Sent. Tr. 39-40; *id.* at 41 (acknowledging that petitioner got "himself into the 121 to 151 Guideline" by "deal[ing] in crack cocaine and guns").

Even now, although petitioner speaks of other types of "cocaine base" such as freebase, coca paste, or coca leaves, he never suggests that the substance he sold to the CI was any of the above. Cf. *United States* v. *Gonzalez*, 608 F.3d 1001, 1005 (7th Cir. 2010) (finding "sufficient expert evidence * * * that the sale of any form of cocaine base other than crack is rare"); *Brisbane*, 367 F.3d at 914 (noting that freebase cocaine is dangerous to manufacture and expensive, and that "cocaine paste smoking never caught on in the United States"). Because the district court found the substance to be crack cocaine, because petitioner acquiesced in that finding,

and because the evidence at trial supports that conclusion, this case is not a suitable vehicle to resolve the conflict among the courts of appeals.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner complains only about his mandatory minimum sentence. This Court has made clear that facts that raise a mandatory minimum sentence within an otherwise-authorized statutory range may constitutionally be found by the court by a preponderance of the evidence. See *Harris* v. *United States*, 536 U.S. 545, 568 (2002). In any case, petitioner does not argue in his petition for a writ of certiorari that the *jury* was required to find that the substance was "crack."

REPLY BRIEF

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FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

The government acknowledges (Opp. 6, 8) the deep, persistent conflict among the courts of appeals with respect to the question presented in the petition—whether the term "cocaine base" in 21 U.S.C. § 841(b)(1) encompasses every form of alkaloid cocaine (that is every form of cocaine that is chemically basic), or instead only "crack" cocaine (one specific kind of alkaloid cocaine). Indeed, six courts of appeals have concluded that "cocaine base" includes all forms of cocaine that are chemically basic. Five courts of appeals hold that the phrase refers only to "crack cocaine" (or, in the D.C. Circuit, potentially any smokeable form of cocaine). See Pet. 13–17.

The government's opposition does not dispute the very substantial importance of the question presented. Thousands of individuals are sentenced every year to the mandatory minimum sentences prescribed by Section 841(b)(1). See Pet. 18–19. The applicability of these mandatory minimums turns principally on the proper definition of "cocaine base." In light of the conflict among the courts of appeals, whether a defendant is sentenced under Section 841(b)(1)'s substantial mandatory minimum provisions often turns exclusively upon the jurisdiction in which the defendant is tried.

The government's sole basis for opposing certiorari is its assertion that "the arguments and evidence at trial" supposedly demonstrate "that the substance in this case was, in fact, crack." Opp. 9. That contention simply is not supported by the record—indeed, it rests on a serious misreading of the proceedings below—and, in addition, provides no basis for denying review and leaving the lower courts

in a state of disarray with respect to this very important issue.

It is, of course, true that there was no finding below that the substance here was *not* crack cocaine—but that is because the government argued successfully that no finding regarding the particular type of cocaine base at issue here was required. Like the defendant who kills his parents and then begs for mercy as an orphan, the government, having prevailed on its claim that the question whether the cocaine base was specifically crack was irrelevant, cannot now contend that review by this Court is inappropriate because the substance might be crack after all.

Indeed, the nature of the cocaine involved here was a disputed issue at trial, and the court of appeals—recognizing the legitimacy of that dispute—refused to rest its judgment on the very factual argument that the government now advances before this Court. That is because the record contains substantial evidence indicating that the cocaine in fact was *not* crack. If petitioner's interpretation of the statute is correct, the lower courts will, of course, have to determine on remand whether or not the transaction in question involved specifically crack. But given the record below, there simply is no basis for presuming the outcome of that determination now, and denying petitioner—and the thousands of other similarly situated individuals—the opportunity to argue the evidence before the district court, as required by the proper interpretation of the statute. Review by this Court accordingly is warranted.[1]

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[1] The government suggests (Opp. 9 n.3) that its argument against review in this case is similar to the reasons advanced for denying prior petitions raising this issue. See Pet. 20 n.10

A. The Court Of Appeals Expressly Refused To Rest Its Decision On The Factual Argument Advanced By The Government.

The government argued in the court of appeals that there was no need for that court to address petitioner's legal argument that the mandatory minimum statute requires a finding that the substance was crack cocaine. The government asserted there, as it does here, that the court could have found that the type of cocaine involved in petitioner's transaction was, indeed, crack. See Gov't Ct. App. Br. 23.

The court of appeals refused to rest its decision on that ground. The First Circuit acknowledged that "some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack" but concluded that "to rely on that would needlessly raise an evidentiary issue that DePierre contests." Pet. App. 10a. The court of appeals also recognized that it had an obligation to eliminate any "doubts about the continued vitality of binding circuit precedent as to the meaning of the statute." *Ibid.*

Given what the First Circuit itself recognized as the contested "evidentiary issue" regarding the type of cocaine involved here, this Court should similarly reject the government's invitation to leave the law in a state of confusion. It should grant review to resolve

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(discussing cases). That simply is not true. Each of those cases featured lower court determinations that would have prevented this Court from reaching the issue of statutory construction—for example, harmless error determinations or express findings by the lower courts that the offenses involved crack cocaine. There are no such lower court determinations here—rather, the court of appeals expressly refused to make such a determination in this case, as we explain below.

the stark conflict among the courts of appeals with respect to the question presented.

The First Circuit's approach in this case also undercuts the government's suggestion (Opp. 11) that as a practical matter, cocaine base sold in this country is virtually always crack cocaine. If that were true, the lower courts would have no occasion to address the legal issue presented here—the government would simply demonstrate that the substance *was* crack cocaine, and obviate the need to address the issue, or courts would adopt the course suggested by the government here and decline to reach the legal issue because the record made clear that the substance involved was crack. The fact that the legal issue has been addressed by the lower courts with such frequency (Pet. 14–17), and that numerous commentators (*id.* at 19–20) have urged resolution of the conflict by this Court, thus casts substantial doubt on the government's claim that crack cocaine is virtually always present.

B. Substantial Record Evidence Indicates That The Substance Here Was Not Crack Cocaine.

The government's argument also falls short on its own terms, because the evidence in the record provides substantial reason to doubt that the substance petitioner distributed was crack. Given the lack of clarity in the record, there is no justification for declining to review the question presented.[2]

[2] The government states that "[e]ven now" petitioner "never suggests that the substance he sold to the" confidential informant was a form of cocaine base other than crack. Opp. 11. As we discuss below, however, petitioner made that precise argument at trial—in questioning witnesses and in closing argu-

1. Petitioner was convicted for distributing cocaine on two separate occasions. Pet. App. 2a. In February 2005, petitioner distributed 61.7 grams of powder cocaine. Tr. 482–483 (identifying substance as "cocaine hydrochloride," *i.e.*, cocaine powder (see Pet. 6)). During a second transaction in March 2005, the petitioner distributed 55.1 grams of a substance containing cocaine. Tr. 490. The latter transaction formed the basis for petitioner's ten-year mandatory minimum.

At trial, Betty Bleivik, a senior forensic chemist for the Drug Enforcement Administration, testified that the substance from the March 2005 transaction ("Government Exhibit 6") contained "cocaine and some cocaine artifacts." Tr. 491. She likewise testified that the substance contained "cocaine base." *Ibid.*; see also *id.* at 492. Significantly, *Bleivik, the government's own witness, never testified that the substance was crack.*

During cross-examination, counsel for petitioner pressed exactly that point. He asked Bleivik: "what does one have to do" in order "to get from [cocaine hydrochloride] to what is commonly referred to as crack?" Tr. 497. She answered that "[o]ne has to remove that hydrochloride salt from the cocaine molecule" and observed that sodium bicarbonate (*i.e.*, "baking soda") is "very commonly used" to produce "crack." *Ibid.*[3] Yet Bleivik confirmed that she "was

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ment. Those facts, reflected in the trial court record, are dispositive of the government's argument. Extra-record assertions in briefs are not relevant, much less required.

[3] Bleivik's testimony on this point was consistent with the Sentencing Guidelines, which note that "crack" cocaine is "usually prepared by processing cocaine hydrochloride and sodium bicarbonate." U.S.S.G. § 2D1.1(c), Note (D).

not able to identify any sodium bicarbonate in Government Exhibit 6." *Id.* at 499; see also *ibid.* ("Government Exhibit is cocaine base, and I was not able to identify any baking soda in that sample.").

Far from "overwhelmingly confirming" that the substance was crack (Opp. 9), the trial evidence thus demonstrated only that the petitioner sold a form of cocaine that was chemically basic (*i.e.*, $C_{17}H_{21}NO_4$); the expert witness never testified that the substance was crack, rather than some other form of chemically basic cocaine, such as coca paste, non-powder cocaine, or freebase cocaine. See Pet. 6–7. If anything, the lack of sodium bicarbonate suggested that the substance was *not* crack at all.

2. The government bases its contrary assertion on scattered snippets from the trial record. Even taken on their own—and certainly when viewed in light of the government's failure to elicit key evidence from its own expert—these factors provide no basis for concluding that the cocaine here definitely was crack.

First, the government is just plain wrong in suggesting (Opp. 11) that the district court found the substance involved in the March 2005 transaction to be crack. During the jury charge, the district court made clear that, in the First Circuit, there is no relevant distinction between "crack" and "cocaine base," using both terms interchangeably. See Tr. 585–586 ("We've heard talk about it in terms of crack cocaine, and you can understand here that the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base * * *."). That instruction, as the First Circuit concluded below, "accord[ed]" with established circuit precedent "h[old-

ing] that 'cocaine base' refers to 'all forms of cocaine base, including *but not limited to* crack cocaine.'" Pet. App. 10a–11a (emphasis added) (quoting *United States* v. *Anderson*, 452 F.3d 66, 86–87 (1st Cir. 2006)).

Because circuit precedent rendered irrelevant any distinction between crack cocaine specifically and alkaloid cocaine generally, the district court and the parties used the terms "crack" cocaine and "cocaine base" interchangeably at the sentencing hearing. That usage—adopted after the district court's ruling on the meaning of "cocaine base"—does not represent a holding by the district court (especially in light of the court's conclusion that such a determination was unnecessary) and certainly provides no basis for a determination that crack cocaine specifically was involved.

Second, the government's reliance (Opp. 9, 11) on a few out-of-context statements by petitioner's counsel is nothing short of bizarre. Petitioner contended at trial that the substance was *not* crack, and vigorously sought a jury instruction allowing the jury to make a determination to that effect. Tr. 512. And trial counsel's cross-examination of Bleivik was designed specifically to demonstrate that the substance was *not* crack. See Tr. 497–499.

Nor did petitioner in the course of his sentencing memorandum concede that the substance he distributed was, as a matter of fact, crack. After the district court rejected petitioner's argument concerning the interpretation of Section 841(b)(1), petitioner's counsel simply followed the court, the government, and the common vernacular in loosely referring to all alternatives to "powder cocaine" as "crack cocaine." See Sentencing Memo. at 6 (observing that the

"mandatory minimum sentence" applies to "crack cocaine" as distinguished from "powder cocaine"). Indeed, in the sentencing memorandum, petitioner's counsel defined the term "crack cocaine" as interchangeable with "cocaine base." *Id.* at 1.

Certainly, nothing trial counsel said there or at any other time amounted to the kind of "formal stipulation[]" that "ha[s] the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2983 (2010). That is how the First Circuit saw it as well, observing that petitioner's "contention, *which was preserved in the district court*, is that the statute should be read to apply only to that form of cocaine base called crack" and thus requires a finding to that effect. Pet. App. 9a (emphasis added).[4]

Third, although the confidential informant, acting at the direction of the government, requested that petitioner sell him crack cocaine (Opp. 9–10), what the informant *asked for* and *believed* he was receiving obviously has no bearing on the chemical composition of what petitioner *actually* provided. And while the government asserts that the substance

[4] The government also faults petitioner for failing to dispute the presentence report's characterization of the substance as crack cocaine. See Opp. 10. But petitioner's trial counsel plainly made a judgment to focus his argument at sentencing on the claim that the government engaged in sentencing factor manipulation (see Pet. App. 3a, 6a–8a) because, if successful, that would have produced the largest sentence reduction. That strategic choice—particularly in light of binding First Circuit precedent making any disputation concerning the type of cocaine base largely pointless—provides no support whatsoever for a concession that the substance in fact was "crack."

was "chunky" and thus potentially "crack" cocaine (*id.* at 10), the substance introduced at trial was not in a "chunky" form. Tr. 493. Moreover, the substance petitioner distributed in February 2005, which the government concedes was cocaine hydrochloride (that is, "powder" rather than "crack" cocaine), was *also* described by the informant at trial as "chunky." *Id.* at 234. Thus the isolated fact that the informant observed that the substance was "chunky" surely does not demonstrate that it was crack.

There is accordingly no basis for denying review on the ground that the record in this case conclusively demonstrates that the cocaine involved here was crack. Should petitioner prevail in this appeal, that factual question would be an issue for resolution on remand.[5]

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[5] The government also argues (Opp. 6–8) that the court of appeals correctly interpreted the relevant statutory provision. That contention of course provides no basis for denying review. And the government's position is unpersuasive in any event. For reasons we have explained (see Pet. 22–25), the government's reading would, for example, render substantial portions of Section 841(b)(1) meaningless. According to the government, Section 841(b)(1)(A)(iii) would impose a ten-year mandatory minimum for distribution of just 50 grams of coca leaves, despite that in Section 841(b)(1)(A)(ii) Congress specifically determined that coca leaves should carry a ten-year minimum sentence only when an individual distributes 5,000 grams of that substance. The government makes no attempt to harmonize these provisions. The legislative history also unambiguously indicates that Congress used the term "cocaine base" to mean exclusively "crack" cocaine (see Pet. 26–27), a conclusion independently necessitated by the rule of lenity (see *id.* at 27).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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PETITIONER'S BRIEF

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FRANTZ DEPIERRE,

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UNITED STATES OF AMERICA,

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QUESTION PRESENTED

Section 841(b)(1)(A) of Title 21 requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug trafficking offense involving either (a) 5 kilograms or more of "coca leaves" or "cocaine," or (b) 50 grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base."

The question presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5,000 grams of cocaine hydrochloride (commonly known as "cocaine powder") would be required to trigger the same ten-year minimum—or whether the term "cocaine base" is limited to crack cocaine.[1]

---

[1] Following the grant of certiorari in this case, Congress amended the quantity of "cocaine base" required to trigger the ten- and five-year mandatory minimum sentences under 21 U.S.C. § 841(b) from 50 grams and 5 grams to 280 grams and 28 grams, respectively. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. We refer in this brief to the trigger levels set forth in the original statute. See note 2, *infra*.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 599 F.3d 25. The district court's oral ruling on jury instructions (Pet. App. 13a) and its imposition of sentence (Pet. App. 14a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 15, 2010, and was granted on October 12, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. At the time of the conduct at issue in this case, Title 21, U.S. Code § 841 provided in relevant part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years * * *.

(1)(B) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years * * *.[2]

---

[2] In 2010, Congress amended the quantity of "cocaine base" required to trigger the ten- and five-year mandatory minimum sentences under 21 U.S.C. § 841(b) from 50 grams and 5 grams to 280 grams and 28 grams, respectively. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. However, at the time of petitioner's offense, conviction, and sentencing, the 50- and 5-gram triggers applied. And the trigger levels included at the time Congress adopted the "cocaine base" standard are the ones relevant in interpreting that standard. Therefore, throughout this brief, we refer to the pre-amendment version of

2. The U.S. Sentencing Guidelines Manual § 2D1.1(c) (Notes to the Drug Quantity Table) provides in relevant part:

> (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

STATEMENT

Nearly 25 years ago, Congress responded to the introduction of crack cocaine to the nation's illegal drug market by enacting the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207, amending the federal drug laws to require significantly longer terms of imprisonment for drug related offenses. This Court has recognized that "[c]rack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern." *Kimbrough* v. *United States*, 552 U.S. 85, 95 (2007).

Congress provided that an offense had to involve 5 kilograms of unprocessed cocaine or 5 kilograms of cocaine's salts (the category that includes "powder cocaine") in order to trigger a ten-year mandatory minimum sentence, but it applied the very same ten-year mandatory sanction to offenses involving only 50 grams of "cocaine base." The question in this case is whether "cocaine base" means only crack cocaine

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the statute. The language of the two versions is identical except for the numerical changes.

or instead includes all cocaine-related substances other than powder cocaine and other cocaine salts.

The statutory language, structure, and context all lead to the same result: "cocaine base" means crack cocaine. The expansive construction of "cocaine base" urged by the government is inconsistent with the statutory language and purpose, would render significant parts of the statute superfluous, and would lead to absurd results—extending this severe mandatory minimum penalty for offenses involving a small quantity of drugs to substances posing a much lower threat of harm than crack cocaine.

A. Statutory Background

1. Regulation Of Cocaine-Related Substances Before The Advent Of Crack Cocaine

Doctors in the late 1800s employed remedies containing cocaine-related substances to treat a variety of conditions including "respiratory ailments," "alcoholism," "morphine addiction," and depression. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 8, 112 (1995) [hereinafter *1995 U.S.S.C. Report*]; see also Joseph F. Spillane, *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884-1920*, at 1 (2000) (cocaine was characterized by doctors "as one of the most important contributions of medical science to health and well-being").

By the beginning of the twentieth century, however, the perception of drugs containing cocaine-related substances had changed. Several States began to regulate such drugs, and in 1914 Congress passed the Harrison Narcotics Act, banning non-

medical use and imposing strict limits on medical uses. *1995 U.S.S.C. Report*, *supra*, at 9.

Congress overhauled federal drug control laws in 1970 through enactment of the Controlled Substances Act (CSA), which was adopted as Title 2 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 1242 (codified as amended in U.S.C. §§ 801 *et seq.*). The CSA repealed most of the older drug laws and created a comprehensive scheme regulating the manufacture, importation, distribution, possession, and use of certain drugs. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-14 (2005) (describing the passage and structure of the CSA).

The statute allocated regulated drugs among five separate schedules, "based on [each drug's] accepted medical uses, the potential for abuse, and [the drug's] psychological and physical effects on the body." *Id.* at 13; see also 21 U.S.C. § 812 (statutory schedule of controlled substances). Cocaine-related substances were classified in Schedule II, 21 U.S.C. § 812(c) (Schedule II(a)(4)), and also included within the statute's definition of a "narcotic drug." 21 U.S.C. § 802(17).

Congress in 1984 adjusted the CSA's penalty structure for drug trafficking offenses by enacting the Controlled Substances Penalties Amendments Act of 1984 (CSPAA), Pub. L. No. 98-473, 98 Stat. 2068. These amendments introduced drug quantity as a factor in determining sentences, with penalties based upon the "type and amount of drug involved in the offense." *1995 U.S.S.C. Report*, *supra*, at 116.

The CSPAA also expanded the range of cocaine-related substances that qualified as a "narcotic

drug," the definition that at the time served as a basis for imposition of the criminal penalty provision under 21 U.S.C. § 841(b). See CSPAA §§ 502 and 507(b), 98 Stat. at 2068, 2071; *United States* v. *Meyers*, 847 F.2d 1408, 1414 (9th Cir. 1988). The term "narcotic drug" was amended by the CSPAA to include the following cocaine-related substances:

> (C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.
>
> (D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.
>
> (E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.
>
> (F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to [in the preceding subclauses].

CSPAA § 507(b) (amending 21 U.S.C. § 802(17)).[3]

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[3] The CSPAA also updated the controlled substances schedules of § 812. See CSPAA § 507(c), 98 Stat. at 2071. Technical amendments in 1986 conformed the exact wording of 21 U.S.C. § 812 to that of § 802. See ADAA § 1867, 100 Stat. at 3702-55; Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 84, 100 Stat. 3592, 3619

An impetus for changing the language was to defeat the so-called "cocaine isomer strategy" that had been employed to challenge prosecutions involving synthetic versions of cocaine-related substances. See, *e.g.*, *United States* v *Puglisi*, 790 F.2d 240, 242 n.1 (2d Cir. 1986) (explaining the reason for the amendment).

2. *The Crack Cocaine Epidemic Of The 1980s*

Crack cocaine first appeared in the illegal drug marketplace in the early 1980s. Crack cocaine is an easy-to-produce, smokeable substance containing cocaine that "delivers large quantities of cocaine to the lungs, producing effects comparable to intravenous injection" without the perceived danger or stigma of needle use. U.S. Drug Enforcement Administration, U.S. DOJ, *Drugs of Abuse* 32 (2005) [hereinafter *Drugs of Abuse*].

Crack cocaine users feel the intense effects of the drug "almost immediately," but the high is "quickly over" compared with snorting cocaine hydrochloride (commonly referred to as "powder cocaine" or "cocaine powder"). *Ibid.*; see also *Kimbrough*, 552 U.S. at 94 ("[S]moking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high."); U.S. Dep't of Health and Human Servs., Pub. Health Serv., Alcohol, Drug Abuse, and Mental Health Administrator, *Stimulants and Cocaine: Just Say No* (1984) (pamphlet on use and dangers of stimulants and cocaine) (stating that smoking crack cocaine produces a "shorter and more intense 'high' than other ways of using [cocaine-related substances] because smoking is the most direct and rapid way to get the drug to the brain").

The ease with which crack cocaine can be produced contributed to its popularity. Crack cocaine can be made "from several basic household products and cocaine [hydrochloride]." *Drugs of Abuse*, *supra*, at 33. It "is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is

divided into single-dose 'rocks' that users smoke." *Kimbrough*, 552 U.S. at 94 (citations omitted).

Crack cocaine "was cheap [to buy], simple to produce, ready to use, and highly profitable for dealers to develop." Drug Enforcement Admin., *Drug Enforcement Administration: A Tradition of Excellence, 1973-2003*, at 59, *available at* http://www.justice.gov/dea/pubs/history/1985-1990.pdf [hereinafter *DEA 1973-2003*]. "Once introduced in the mid-1980's, crack abuse spread rapidly and made the cocaine experience available to anyone with $10 and access to a dealer." *Drugs of Abuse*, *supra*, at 32. As the Director of the National Institute on Drug Abuse put it when he testified before Congress, "[t]he recent manufacturing and distribution of crack cocaine, which has emerged in 1985 is * * * of great concern because it is conveniently packaged, easily and rapidly ingested by smoking, and initially affordable." *"Crack" Cocaine, Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 13 (1986) [hereinafter *1986 S. Crack Cocaine Hearing*] (statement of Charles R. Schuster, Ph.D, Director, National Institute on Drug Abuse).

According to the Drug Enforcement Administration, "in 1985, the crack epidemic hit the United States full force, resulting in escalating violence among rival groups and crack users in many * * * cities." *DEA 1973-2003*, *supra*, at 59. "By early 1986, crack had a stranglehold on the ghettos of New York City and was dominated by traffickers and dealers from the Dominican Republic. Crack distribution and abuse exploded in 1986, and by year-end was available in 28 States and the District of Columbia." *Id.* at 60. As crack cocaine spread through American cities,

it "dramatically increased the numbers of Americans addicted to cocaine." *Ibid.*

Heroin had been considered to be the most dangerous unlawful drug—before the arrival of crack cocaine. But experts noted that crack cocaine was more addictive and more dangerous than heroin, as well as cheaper to produce and buy on the street. *The Crack Cocaine Crisis, Joint Hearing Before the Select Comm. on Narcotics Abuse and Control, H.R., and the Select Comm. on Children, Youth, and Families, H.R.*, 99th Cong. 60 (1986) [hereinafter *1986 H.R. Crack Cocaine Hearing*] (testimony of Isaac Fullwood, Assistant Chief of Police, Washington, D.C.); see also U.S. Customs Serv. Drug Awareness Program, *Crack—The New Menace: You Can Help!* (1986) (noting that "[t]he significant differences between [crack cocaine] and ordinary cocaine have caused its abuse to explode across our country, coast to coast").

The extensive media coverage of crack cocaine during this period was summarized by the U.S. Sentencing Commission in its 1995 report to Congress:

> Crack cocaine was first mentioned in the media by the Los Angeles Times on November 25, 1984, referring to a cocaine "rock" that was appearing in the barrios and ghettos of Los Angeles. The New York Times first mentioned crack in a story on November 17, 1985. The coverage increased and intensified over time. In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in Time and Newsweek. NBC news ran 400 separate reports on crack (15 hours of airtime). Time

> called crack the "Issue of the Year" (September 22, 1986). Newsweek called crack the biggest news story since Vietnam and Watergate (June 16, 1986). CBS News aired a documentary entitled "48 Hours on Crack Street."

1995 U.S.S.C. Report, *supra*, at 122.

3. Congress Responds To The Crack Cocaine Epidemic

This Court has recognized that by 1986 crack cocaine "was already a matter of great public concern" and, in the minds of members of Congress, "a problem of overwhelming dimensions." *Kimbrough*, 552 U.S. at 95 (quoting *1995 U.S.S.C. Report*, *supra*, at 121). Congressional committees held hearings in 1986 to gather information regarding crack cocaine.[4]

These deliberations culminated in enactment of the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207. The ADAA imposed mandatory minimum penalties for offenses involving controlled substances, including cocaine-related sub-

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[4] See, *e.g.*, *1986 H.R. Crack Cocaine Hearing*, *supra*, at 2 (statement of Rep. Gilman, member, H. Select Comm. on Narcotics Abuse and Control) ("[A]n even deadlier drug is now available for consumption. That drug is crack, and it's sweeping across our country like a tidal wave. It's inexpensive and highly depressive, our young people are using it in all of our metropolitan areas * * * ."); *1986 S. Crack Cocaine Hearing*, *supra*, at 1-2 (statement of Chairman Roth) (identifying "a frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack,'" and observing that "crack is endangering the lives and futures of many people who previously would not have had access to cocaine").

stances. It imposed a mandatory ten-year minimum sentence for cocaine-related offenses, depending on both the quantity and type of cocaine-related substance involved. The ten-year minimum applied to offenses involving:

> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
>
> > (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
> >
> > (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
> >
> > (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
> >
> > (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); [or]
>
> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base.

Id. § 1002, 100 Stat. at 3207-2 (codified as amended at 21 U.S.C. § 841(b)(1)(A)(ii), (iii)). Offenses involving 500 grams or more of mixtures containing coca leaves or cocaine, and those involving 5 grams or more of such mixtures "which contain[] cocaine base," carried a five-year mandatory minimum. 100

Stat. at 3207-3 (codified as amended at 21 U.S.C. § 841(b)(1)(B)(ii), (iii)).[5]

The four categories of cocaine-related substances set forth in clause (ii) above repeat verbatim the then-existing cocaine-related provisions of the "narcotic drug" definition in 21 U.S.C. § 802(17). Clause (iii), however, creates a new category: "a mixture or substance described in clause (ii)" that "contains cocaine base." The statute thus punishes the possession of just 50 grams of such a mixture containing "cocaine base" as severely as 5,000 grams (5 kilograms) of any cocaine-related mixture that does not.[6]

While the ADAA "moved quickly through Congress and the legislative history is sparse," that history, "as evidenced mainly by the statements of individual legislators, suggests that Congress perceived crack cocaine to be at the forefront of a national drug-abuse epidemic." U.S. DOJ, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 10 n.71 (2002); see also, *e.g.*, 132 Cong. Rec. 22,948-22,949 (1986) (statement of Rep. Young) (noting that "[c]rack is extremely dangerous because it is immediately addictive," "relatively inexpensive," and "can cause death" and that the legislation took a "wide-ranging approach to combat drug abuse"); *id.* at

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[5] Congress imposed the same mandatory minimums with respect to smuggling these substances. CSA § 1301, 100 Stat. at 3207-15 to 3207-18 (codified as amended at 21 U.S.C. § 960(b)).

[6] The Fair Sentencing Act of 2010 increased the quantity of a mixture or substance containing "cocaine base" necessary to trigger the five-year and ten-year mandatory minimum sentences from 5 grams and 50 grams to 28 grams and 280 grams, respectively, and also eliminated the mandatory minimum sentence for simple possession of "cocaine base." See note 1, *supra*.

22,977 (statement of Rep. McCollum) ("[C]rack * * * has become one of the most tremendous problems that we have."); *id.* at 22,991 (statement of Rep. Dorgan) ("[D]rug use * * * in America has reached epidemic proportions. * * * Perhaps even more alarming [than widespread use of cocaine-related substances] is the growing popularity of crack or cheap cocaine.").[7]

As this Court has explained, Congress's intent in enacting this new penalty provision was to single out offenses involving crack cocaine for enhanced punishment. "Congress apparently believed that crack was significantly more dangerous than powder cocaine" in several ways, including that:

> (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

Kimbrough, 552 U.S. at 95-96 (citing U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* iv (2002)). The Solicitor General urged this position on the Court in *Kimbrough*. See U.S. Br. at 31-32, *Kimbrough*, 552 U.S. 85 (No. 06-6330) ("Congress clearly intended to impose signifi-

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[7] Indeed, weeks before it adopted drug law changes, Congress sent a joint resolution to the President, declaring October 1986 "Crack/Cocaine Awareness Month." H.J. Res. 678, 99th Cong. (1986).

cantly greater penalties on distributors of crack cocaine than similarly situated distributors of powder cocaine.").

B. Scientific Background

1. Chemical Description

Cocaine is a naturally occurring chemical compound found in the leaves of the coca plant indigenous to South America. *1995 U.S.S.C. Report*, *supra*, at 9; see also *United States* v. *Gonzalez*, 608 F.3d 1001, 1002 (7th Cir. 2010) (Posner, J.). Cocaine has the molecular formula $C_{17}H_{21}NO_4$, meaning that in each molecule of cocaine there are 17 carbon atoms, 21 hydrogen atoms, 1 nitrogen atom, and 4 oxygen atoms. See *United States* v. *Edwards*, 397 F.3d 570, 574 (7th Cir. 2005); *United States* v. *Barbosa*, 271 F.3d 438, 462 (3d Cir. 2001).[8]

Chemical compounds are often grouped together based upon common characteristics. One common classification scheme describes compounds as either acids or bases because "many of the reactions that occur in organic chemistry are either acid-base reactions themselves or * * * involve an acid-base reaction." T.W. Graham Solomons & Craig B. Fryhle, *Organic Chemistry* 97 (8th ed. 2004). There are a vari-

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[8] Simply specifying a given number of various different types of atoms does not uniquely define a chemical compound because the given atoms can be bonded together in different arrangements. Thus, while cocaine has the molecular formula $C_{17}H_{21}NO_4$, not all compounds with the molecular formula $C_{17}H_{21}NO_4$ are cocaine. These other compounds are isomers of cocaine. Legally, the difference between cocaine and its isomers may be negligible because 21 U.S.C. § 841 lumps together "cocaine * * * [and its] optical and geometric isomers." 21 U.S.C. § 841(b)(1)(A).

ety of technical definitions for the terms "acid" and "base" suited to various types of chemical reactions. One of the most general definitions states that an acid "is a [compound] that accepts an electron pair to form a new bond in a chemical reaction" and a base is "the [compound] that donates the electron pair." G. Marc Loudon, *Organic Chemistry* 83 (Oxford Univ. Press, 4th ed. 2002).

Cocaine is a base. It belongs to a group of compounds known as alkaloids, which are "nitrogen-containing *bases* that occur naturally in plants." *Id.* at 1108 (emphasis added); see also *United States* v. *Brisbane*, 367 F.3d 910, 911 (D.C. Cir. 2004) ("Cocaine is a naturally occurring alkaloid—that is, a base.").[9]

Cocaine's basicity is a result of its structure; accordingly, that basicity persists as long as the cocaine molecule persists. If cocaine is mixed with other substances with which it does not react chemically, the cocaine molecule will persist in the mixture and retain its intrinsic basicity.

But if cocaine's molecular structure is changed through a chemical reaction, then the result is a new and different molecule, one that may or may not be basic depending on its structure. For example, react-

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[9] Alkaloids (including cocaine) are classified as a subset of a larger group of nitrogen-containing organic compounds called amines. Loudon 1108. Amines are "the most common organic *bases*." *Ibid.* (emphasis added); see also *id.* at 1110 ("Basicity is one of the most important chemical properties of amines.") The structure and consequent basicity of cocaine have been understood for over a century. See, *e.g.*, A. Pictet, *The Vegetable Alkaloids* 233 (H.C. Biddle trans. 1904) ("Cocaine is a tertiary base.").

ing cocaine (a base) with hydrochloric acid under the right conditions produces a new and different chemical compound called cocaine hydrochloride (the salt that is commonly known as "powder cocaine"). See *Gonzalez*, 608 F.3d at 1002; *Brisbane*, 367 F.3d at 911; *Barbosa*, 271 F.3d at 462.

Molecules of cocaine hydrochloride can be processed by chemical reaction back into molecules of cocaine. *Gonzalez*, 608 F.3d at 1003. Molecules of cocaine in a coca leaf, on one hand, and molecules of cocaine produced via chemical reaction from cocaine hydrochloride, on the other, are "chemically indistinguishable" and, as with all molecules of cocaine, are inherently basic. *Barbosa*, 271 F.3d at 462.

2. Production Techniques

Prior to its importation into the United States, cocaine is ordinarily extracted from coca leaves by means of "mixing the leaves with an alkaline material (*e.g.*, sodium bicarbonate), an organic solvent (*e.g.*, kerosene), and water." *1995 U.S.S.C. Report*, *supra*, at 11.[10] The resulting solid substance is known as coca paste, and because it contains molecules of cocaine, it is a chemically basic substance. *Ibid.*

The substance known as "powder cocaine"—chemically, cocaine hydrochloride—is made by processing coca paste with the use of, among other substances, hydrochloric acid, potassium salt, and water. *Id.* at 12. Cocaine hydrochloride has the molecular formula $C_{17}H_{22}ClNO_4$ and is classified chemically

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[10] "Due to differing environmental factors, the cocaine content of the coca leaf ranges between 0.1 percent and 0.8 percent." *Ibid.*

as a salt, rather than a base. *Ibid.* Because they are entirely different molecules, cocaine hydrochloride is chemically a different substance than cocaine. "Cocaine hydrochloride is a powder usually consumed either by being sniffed or by being dissolved in water and then injected. (It cannot be smoked because heating causes it to burn rather than vaporize.)" *Gonzalez*, 608 F.3d at 1002-1003.

Crack cocaine, on the other hand, is a smokeable substance ordinarily produced by reacting cocaine hydrochloride with water and sodium bicarbonate (*i.e.*, baking soda), a process that converts the cocaine hydrochloride molecules into the chemically distinct cocaine molecules found in crack cocaine. See *1995 U.S.S.C. Report*, *supra*, at 14; see also *Gonzalez*, 608 F.3d at 1004 (noting that the "usual method" of making crack cocaine is by using baking soda but also noting alternatives of using other "weak bases" to achieve the same result).

Thus, crack cocaine—like coca leaves and coca paste—has molecules of cocaine and is chemically basic. See *1995 U.S.S.C. Report*, *supra*, at 12-13; see also *Barbosa*, 271 F.3d at 462 ("The chemical compound $C_{17}H_{21}NO_4$, either in nature or upon conversion from cocaine hydrochloride, is a base, and its distinct physical forms, such as coca paste and crack, are chemically indistinguishable.").

"Freebase" is another substance that contains molecules of cocaine and is consequently chemically basic. In contrast to crack cocaine, "freebase" cocaine results from mixing cocaine hydrochloride with a strong alkali solution (such as ammonia) and an organic solvent (such as ether). *1995 U.S.S.C. Report*, *supra*, at 13. The popularity of "freebase" declined in the 1980s following a notorious accident that befell

celebrity comedian Richard Pryor when, because of his "freebasing" with the extremely flammable ether solvent, he sustained serious burns to his body. *Ibid.* Although "there are still freebasers" in the United States today, "crack is generally believed to be the only form of cocaine base that is widely consumed," *Gonzalez*, 608 F.3d at 1003, because it is far less dangerous to produce and delivers the same high as "freebase."

C. The Sentencing Commission Guidelines

The U.S. Sentencing Commission in 1987 calibrated sentences for offenses involving "cocaine base" in light of the mandatory minimum sentences prescribed by Congress under the ADAA. That is, the Commission designed the Guidelines' drug quantity table—which provides base offense levels corresponding to possession of various quantities of drugs—so that these base offense levels would translate into sentences consistent with the mandatory minimum sentences those same quantities of controlled substances would trigger under the ADAA. See U.S.S.G. § 2D1.1(a) (1987) (instructing judges to "[a]pply * * * the offense level specified in the Drug Quantity Table set forth in subsection (c)"); *id.* § 2D1.1(c) (providing base offense levels for possession of different quantities of various controlled substances, including for "cocaine base"); see also *id.* § 2D1.1 cmt. n.10 (stating that the Commission had "used the sentences provided in, and equivalences derived from, the ADAA, as the primary basis for the guideline sentences"); *Kimbrough*, 552 U.S. at 109 (noting that "[i]n formulating Guidelines ranges for crack cocaine offenses, * * * the Commission looked to the mandatory minimum sentences set in the 1986 Act").

The federal courts of appeals quickly divided with respect to the meaning of the term "cocaine base" in the Guidelines. Some circuits held that "cocaine base" had a strictly scientific meaning and encompassed any form of cocaine—including but not limited to crack cocaine—that qualified chemically as a base. See, *e.g.*, *United States* v. *Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992) (per curiam) ("[T]he term 'cocaine base' has a specific scientific meaning."); *United States* v. *Jackson*, 968 F.2d 158, 161-163 (2d Cir. 1992) ("'[C]ocaine base' has a precise definition in the scientific community.").

By contrast, the Ninth Circuit concluded, based on a lengthy review of the background of the enactment of the ADAA, that Congress did not intend a scientific meaning for the term "cocaine base." *United States* v. *Shaw*, 936 F.2d 412, 415-416 (9th Cir. 1991) (noting multiple legislative statements about crack cocaine and the lack of "any statements indicating that 'cocaine base' refers to cocaine that is a 'base' for chemistry purposes"). It held that "Congress and the Commission must have intended the term 'cocaine base' to include 'crack,' or 'rock cocaine,' which we understand to mean cocaine that can be smoked, unlike cocaine hydrochloride [powder]." *Id.* at 416.

In 1993, the Commission submitted to Congress an amendment to the Guidelines resolving this disagreement by explicitly defining "cocaine base" as crack cocaine:

> "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride

> and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. § 2D1.1(c) (Notes to the Drug Quantity Table), amend. 487 (proposed).

The Sentencing Commission explained that "[u]nder this amendment, forms of cocaine base other than crack (*e.g.*, coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine." *Ibid.* The amendment took effect several months later. See 28 U.S.C. § 994(p); U.S.S.G. § 2D1.1(c) (Notes to the Drug Quantity Table), amend. 487 (eff. Nov. 1, 1993).

D. Proceedings Below

1. The Indictment And Trial

Petitioner was charged with distributing 50 grams or more of a substance containing "cocaine base," in violation of 21 U.S.C. § 841(a)(1), and the government sought a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii).

The government argued to the district court that the jury was required to find only that petitioner distributed "cocaine base, not that it was the particular form of cocaine base known as crack cocaine." Tr. 443.[11] Petitioner requested that the jury be instructed that it was obligated to find that petitioner's offense involved "not just cocaine base, but the form known as crack cocaine." Tr. 512. The district court ruled that "the question is cocaine base; that is, the nonhydrochloride form of cocaine, which may or may

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[11] "Tr." refers to the trial transcript.

not manifest itself in something that's been identified as crack cocaine." Pet. App. 13a.

The court's instructions directed the jury to determine whether the controlled substance was "cocaine base," pointing out that there had been testimony about "crack cocaine" but that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." Tr. 585; see also Tr. 595 (reemphasizing the government's burden to prove "that what was involved was cocaine base").[12] The verdict form likewise required the jury to find only that petitioner possessed "cocaine base." Pet. App. 17a.[13]

Following petitioner's conviction, the district court sentenced him to ten years in prison—the minimum sentence required given the court's determination that "cocaine base" under 21 U.S.C. § 841(b)(1)(A)(iii) means all chemically basic forms of cocaine. The district judge stated:

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[12] Although the jury was asked to determine the nature of the drug at issue, the court of appeals acknowledged that this jury finding was not required under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. 9a.

[13] Moreover, the evidence would not have supported a finding that petitioner's offense involved crack cocaine. The government's expert witness was "not able to identify baking soda in th[e] sample" (Tr. 499) and did not otherwise testify that the substance was crack cocaine. The court of appeals erred in suggesting that "some evidence indicates the substance here was crack." Pet. App. 10a. The district court did "repeatedly refer[] to [the substance] as crack" at sentencing (see *ibid.*), but that was because after the district court's jury instruction the parties used the term "cocaine base" and "crack cocaine" interchangeably. Pet. 11 n.5.

> I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation [of 41-51 months] that [petitioner's counsel] made than it is to that which the government made, but I don't have the choices here. So, under these circumstances, I've given you the lowest sentence in terms of incarceration that I can * * * .

Pet. App. 15a.[14]

2. *The Court Of Appeals's Decision*

The court of appeals affirmed, rejecting petitioner's contention that the term "cocaine base" in § 841(b)(1)(A)(iii)—the provision requiring the ten-year mandatory minimum sentence—should be construed to encompass only crack cocaine and not other cocaine-containing substances that can be categorized chemically as a base. The court stated that while crack cocaine was "admittedly" the main focus of Congress's concern in passing the ADAA, prior First Circuit precedent held that "cocaine base" in § 841(b)(1)(A)(iii) "refers to 'all forms of cocaine base, including but not limited to crack cocaine.'" Pet. App. 10a-11a (quoting *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006)). The court below observed

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[14] Petitioner also was convicted of distributing powder, in violation of 21 U.S.C. § 841(a)(1); and he pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Judgment in a Criminal Case at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW (D. Mass. Aug. 8, 2008) (Dkt. #59). Neither of those convictions carried a mandatory minimum sentence. See 21 U.S.C. § 841(b); 18 U.S.C. § 924(a)(1)(B).

that other courts of appeals had adopted conflicting interpretations of the statute, and stated that "[b]ecause of the circuit split this issue does need resolution by the Supreme Court." Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

The ten-year mandatory minimum sentence for drug offenses involving small quantities of "cocaine base" is a particularly severe punishment. Offenses involving cocaine hydrochloride (commonly known as "powder cocaine"), by contrast, must involve a quantity one hundred times as great to trigger the same ten-year penalty.

Congress limited the application of this severe penalty to offenses involving a particularly dangerous and especially addictive form of cocaine—crack cocaine. All of the relevant principles of statutory interpretation compel that result.

To begin with, there is no doubt that "cocaine base" defines a targeted subset of all cocaine-related substances. Clause (ii) of 21 U.S.C. § 841(b)(1)(A) imposes the ten-year mandatory minimum for offenses involving 5 kilograms of specified cocaine-related substances, such as "coca leaves" and "cocaine, its salts, optical and geometric isomers, and salts of isomers," that—taken together—comprise the entire universe of cocaine-related substances subject to criminal sanctions. Clause (iii) then imposes the same ten-year mandatory minimum for offenses involving only 50 grams of substances "described in clause (ii)" that "contain[] cocaine base."

"Cocaine base" is not separately listed in the statute as a controlled substance, and clause (iii)'s use of that phrase as a limitation on the substances de-

described in clause (ii) makes clear that "cocaine base" defines a subcategory of cocaine-related substances. And the significantly reduced quantity trigger specified in clause (iii) means that the substances encompassed within that provision must be an especially dangerous subset of cocaine-related substances.

The lower courts have identified two alternative definitions for the subset of cocaine-related substances encompassed within clause (iii): crack cocaine, or every cocaine-related substance that is chemically basic—effectively every cocaine-related substance other than powder. The only logical conclusion is that the provision reaches only crack cocaine.

This Court has observed that "[c]rack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern." *Kimbrough*, 552 U.S. at 95. The particular characteristics of crack—its highly addictive nature, the ease with which it could be produced, its low cost, and the violence accompanying the new drug's onslaught—made it "significantly more dangerous than powder cocaine." *Ibid.*

Because Congress was legislating in the context of the drug trade, attempting to define a particular type of substance new to the United States, it looked to terms used in the drug trade in crafting the statutory language. Cf. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (defining the term "working conditions" by reference to its "specific meaning in the language of industrial relations").

A variety of colloquial terms were used to refer to this new, much more potent form of cocaine—for ex-

ample, "base," "freebase," "rock," and "crack." Congress selected one of these terms, "cocaine base," to make clear that the significantly lower quantity triggers provided for in clause (iii) applied to this new, especially dangerous form of cocaine.

Certainly it is indisputable that Congress's purpose was to target crack cocaine. The statutory context makes Congress's focus clear, and this Court in *Kimbrough* recognized that crack cocaine had become "a problem of overwhelming dimensions" in the minds of members of Congress. 552 U.S. at 95. Interpreting "cocaine base" to encompass only crack cocaine is the result consistent with this congressional purpose.

The 1993 amendments by the Sentencing Commission to the Guidelines further support this conclusion. The Commission determined that construing "cocaine base" to mean crack cocaine was consistent with Congress's intent in 1986. And Congress's decision to allow the Guidelines amendment to take effect buttresses that determination.

Adopting the alternative interpretation of "cocaine base"—construing the term to mean any cocaine-related substance that is chemically basic—would render significant parts of § 841(b)(1)(A) superfluous, thus violating the Court's obligation to interpret statutes so as to give effect to each word enacted by Congress. Because all substances classified chemically as cocaine are basic, this approach would mean that the 5-kilogram trigger for violations involving "cocaine" in clause (ii) would *never* apply because in every case the ten-year sentence would have been triggered by the lower requirement of 50 grams in clause (iii).

For the same reason, this approach would render superfluous the provision of clause (ii) stating that a defendant convicted of distributing coca leaves would have to distribute 5 kilograms of the leaves to trigger the ten-year mandatory minimum sentence. Because coca leaves contain the (chemically basic) cocaine molecule, applying the chemical interpretation of "cocaine base" to the statute would mean that clause (iii) would impose the mandatory ten-year sentence for an offense involving only 50 grams of leaves—the 5 kilogram trigger for "coca leaves" would never apply because 1/100th of that amount of leaves would have already triggered the ten-year minimum sentence.

The results of construing "cocaine base" as a chemical term would be absurd. An offense involving 50 grams of coca leaves would be punished more severely than one involving 4,995 grams of cocaine hydrochloride powder—a much more dangerous substance. As Judge Posner observed in rejecting this approach, "no reason has ever been suggested why Congress would have wanted crimes involving unprocessed cocaine to be punished more heavily than crimes involving cocaine hydrochloride." *Gonzalez*, 608 F.3d at 1003.

Finally, the rule of lenity mandates adoption of the more restrictive reading of the provision. The rule that criminal statutes should be construed narrowly, which applies to sentencing provisions as well, "embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Clause (iii) certainly cannot be said to clearly extend the significantly smaller quantity triggers to all forms of cocaine, including coca leaves

and other unprocessed forms—imposing much harsher sentences than those that apply to the same or greater quantities of cocaine hydrochloride powder notwithstanding the greater danger posed by the latter substance. The rule of lenity therefore requires that the provision be interpreted to encompass only crack cocaine.

ARGUMENT

"COCAINE BASE" IN SECTION 841(b) MEANS CRACK COCAINE.

The text of § 841(b)(1)(A)(iii) targets offenses involving a specified subset of cocaine-related substances for an especially severe mandatory minimum sentence. The phrase defining that subset—"cocaine base"—can only mean crack cocaine. That interpretation is supported by the phrase's text as well as by the legislative context. The alternative urged by the government, construing "cocaine base" to mean any cocaine-related substance classified chemically as a base, is inconsistent with the statutory language and context, would render other parts of the statute superfluous, and would lead to absurd results. Even if the statute were ambiguous, which it is not, the rule of lenity would mandate rejecting the government's broad rule, and interpreting the statute to impose its severely smaller quantity triggers only on offenses involving crack cocaine.

A. Section 841(b)(1)(A)(iii) Describes A Targeted Subset Of Cocaine-Related Mixtures And Substances.

The structure and language of the statute make clear that clause (iii) singles out a limited subset of cocaine-related substances, mandating an especially

harsh punishment for offenses involving that specially defined class of substances.

First, this targeting is evident from the plain language of the provision. Clause (iii) applies to violations involving a "mixture or substance *described in clause (ii)* which contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii) (emphasis added). The text thus makes clear that the dramatically heightened penalties apply to a subset of the mixtures and substances described earlier in clause (ii)—those that "contain[] cocaine base."

Second, the source of the language used by Congress confirms this conclusion. Clause (ii)'s description of cocaine-related substances is identical to the statutory definition of cocaine-related substances that Congress had adopted in 1984. See pages 6-7 & note 3, *supra*.

Clause (iii)'s critical term—"cocaine base"—by contrast, does not appear in the statutory provisions defining the universe of cocaine-related substances subject to criminal penalties. The only possible conclusion is that the term "cocaine base" in clause (iii) defines a subset of mixtures or substances already included in the universe of cocaine-related controlled substances. Indeed "cocaine base" *must* be a subset of one of the enumerated controlled substances; it is not itself listed on the controlled substances schedules, see 21 U.S.C. § 812(c), and so may be subject to criminal sanctions only because it is encompassed within a term already on those schedules.

Third, Congress's intent to target specially a subset of cocaine-related substances is confirmed by the significant disparity in the quantities required by clauses (ii) and (iii) to trigger the ten-year mandatory

minimum. For purposes of determining the applicable mandatory minimum sentence, Congress characterized one gram of a substance containing "cocaine base" as the equivalent of 100 grams of other cocaine-related substances. It thus treated substances containing "cocaine base" as one hundred times more dangerous than other cocaine-related substances. That demonstrates Congress's intent to target an especially dangerous subset of the universe of cocaine-related substances.[15]

B. The Statutory Language And Context Demonstrate That Congress Targeted Only Crack Cocaine.

The lower courts have identified two alternative definitions for the subset of cocaine-related substances encompassed within clause (iii): either crack cocaine, or every cocaine-related substance that is chemically basic—that is, effectively every cocaine-related substance other than powder.

The only logical conclusion is that clause (iii)'s requirement—that the mixture or substance "contain[] cocaine base"—requires that the mixture or substance contain crack cocaine. This interpretation is the only one consistent with the statutory language and structure of the ADAA, as well as with its legislative context.

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[15] While Congress modified this multiple in the Fair Sentencing Act of 2010, see note 6, *supra*, the 100 to 1 ratio contained in the legislation enacting clause (iii) is the relevant legislative context for determining the meaning of the term "cocaine base."

1. "Cocaine Base" Was Understood To Mean Crack Cocaine.

In construing a statutory term, this Court often looks to the use of the word or phrase in the field in which Congress was legislating, recognizing that Congress may have adopted its meaning from that context. In *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), for example, the Court defined the term "working conditions" by reference to its "specific meaning in the language of industrial relations." *Id.* at 202; see also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 343-346 (1991) (defining "seaman" by reference to the general understanding in the maritime industry); *Louisiana Pub. Servs. Comm'n* v. *FCC*, 476 U.S. 355, 371-372 (1986) (defining "charges," "classifications," and "practices" for regulatory purposes "by reference to the trade or industry to which they apply").

Here, Congress was legislating in the context of the drug trade—in particular seeking to define an especially dangerous category of substance new to the United States. And it is clear that the terms used in the drug trade influenced the language Congress chose.

A variety of popular terms were used to refer to the new, much more potent form of cocaine, such as "base," "freebase," "rock," and "crack." The terms "crack" and "freebase" appeared most frequently, the latter because of the well-publicized incident involving comedian Richard Pryor. See page 19, *supra*; see also, *e.g.*, 132 Cong. Rec. 17,342 (1986) (statement of Sen. Hawkins) ("'The base substance, crack or rock as it is sometimes called, can result in paranoia * * * ."); *1986 H.R. Crack Cocaine Hearing*, *supra*, at 26 (statement of Jerome H. Jaffe, M.D., Director, Addic-

tion Research Ctr., National Institute on Drug Abuse) (in the mid-1980s, "a new way to prepare and market freebase cocaine appeared on the illegal drug scene. This involved preparing freebase with sodium bicarbonate and eliminating the use of organic solvents. This produced a hard, white material, which [became] known as 'crack' * * * ."); H.R. 5484, 99th Cong. (1986) (calling for the development of alcohol and drug abuse prevention literature, "including literature on the adverse effects of cocaine free base (known as 'crack')"); Dave Von Drehle, *S. Florida's Drug Dens: Crack Lairs Breed Fear, Frustration*, Miami Herald, Oct. 5, 1986, at A1 (noting that at one address "[a]t least five vacant apartments have been converted into cocaine 'base houses'").

Congress needed to select a term to enact into law that would target this particularly dangerous category of cocaine-related substances. One legislative proposal was entitled "A Bill To Provide an Emergency Federal Response to the Crack Cocaine Epidemic Through Law Enforcement, Education and Public Awareness, and Prevention." See S. 2715, 99th Cong (Aug. 5, 1986) ("The Emergency Crack Control Act of 1986"). Initial proposals for the penalty enhancements in both the House and the Senate provided for increased mandatory minimums for offenses involving "cocaine freebase" as compared to those involving "cocaine." See, *e.g.*, *id.* § 101 (adding "cocaine freebase" to the list of Schedule I controlled substances and providing penalty enhancements for "5 grams or more of cocaine freebase"); H.R. 5484 § 608, 99th Cong. (Sep. 8, 1986) (adding enhanced penalties for specified amounts of "cocaine freebase" and differentiating between "cocaine freebase" and "cocaine").

The final bill's substitution of "cocaine base" for "cocaine freebase" could reflect a discomfort with the term "freebase" as too colloquial to appear in a statute –especially given its association with the Richard Pryor incident. It may also have stemmed from the fear that "freebase" could be interpreted to refer only to a particular manufacturing process. See pages 18-19, *supra*. But the replacement of one term derived from the drug trade with another term derived from the drug trade certainly provides no basis for concluding that Congress intended to switch from an industry specific term to one grounded in chemistry that would reach a dramatically broader set of substances.

Statements by members of Congress reflected the popular understanding that "cocaine base" was a synonym for crack cocaine. Cf. *Amoco Prod. Co.* v. *Village of Gambell, AK*, 480 U.S. 531, 554 (1987) (citing "[n]umerous statements by * * * legislators reveal[ing] a common understanding consistent with the [statute's] plain meaning"). For example, Senator Chiles, who previously introduced his own bill addressing the crisis, The Emergency Crack Control Act of 1986, S. 2715, 99th Cong. (1986), noted that the ADAA created enhanced penalties for crack cocaine offenses:

> [T]itle I [of the ADAA] addresses the widespread emergence of crack cocaine in this country * * *. I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties. The bill also recognizes crack's insidious impacts on neighborhoods by outlawing crack houses

> and doubling penalties for those who manufacture drugs within 1,000 feet of our schools.

132 Cong. Rec. 27,180 (1986) (statement of Sen. Chiles). See also pages 13-14, *supra* (collecting statements by members of Congress).

Indeed, the government itself has in the past understood clause (iii) as reflecting Congress's determination that "crimes involving crack should be subject to considerably more severe penalties." U.S. Br. at 4, *Kimbrough*, 552 U.S. 85. (No. 06-6330). This Court and lower courts, as well, have typically referred to "cocaine base" with a parenthetical reference to crack as a pseudonym.[16]

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[16] See, *e.g.*, *Edwards* v. *United States*, 523 U.S. 511, 512-513 (1998) (Breyer, J.) ("The Government charged petitioners with * * * conspiring 'to possess with intent to distribute * * * cocaine base' (*i.e.*, 'crack')."); *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996) (Rehnquist, C.J.) ("respondents were indicted * * * on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack)"); *United States* v. *Haile*, 865 F.2d 1269, at *1 (6th Cir. 1989) (unpublished disposition) ("Haile has appealed the introduction into evidence of 410 grams of cocaine base (crack)"); *United States* v. *Taylor*, 862 F.2d 871, 871 (4th Cir. 1988) (unpublished disposition) ("Roberto Charles Taylor appeals an order of the district court which denied his motion to suppress cocaine base ('crack') found on his person"); *United States* v. *McDonald*, 877 F.2d 91, 92 (D.C. Cir. 1989) (noting that the defendants were charged with possession with intent to distribute "cocaine base ('crack')"); *United States* v. *Horton*, 873 F.2d 180, 180 (8th Cir. 1989) (same); *United States* v. *Paulino*, 873 F.2d 23, 24 (2d Cir. 1989) (same).

2. *Congress's Clear Purpose Was To Impose Higher Penalties On Offenses Involving Crack Cocaine.*

This Court recognized in its opinion in *Kimbrough* that crack cocaine was Congress's focus in enacting this provision:

> Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: "Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions."

Kimbrough, 552 U.S. at 95 (quoting *1995 U.S.S.C. Report*, *supra*, at 121). The government has agreed that "the legislative history of the [ADAA] indicates that Congress believed that crack cocaine was at the forefront of the national drug epidemic." U.S. Br. at 4-5, *Kimbrough*, 552 U.S. 85 (No. 06-6330).

The legislative history strongly supports this conclusion; statements by numerous members of Congress show that the enhanced penalties were targeted at crack cocaine. Legislators registered their concern that "addiction to crack * * * [was] sweeping the country," *1986 H.R. Crack Cocaine Hearing*, *supra*, at 5 (statement of Rep. Hamilton Fish), and that "[t]he recent introduction of 'crack' cocaine * * * has allowed [the] percentage [of drug users] to spiral upward." 132 Cong. Rec. 27,185 (1986) (statement of Sen. Bumpers). "To the extent that Congress saw the drug problem as a national 'epidemic' in 1986, it viewed crack cocaine as at the very forefront." *1995 U.S.S.C. Report*, *supra*, at 117. See also pages 31-34, *supra*.

Congress's concern about crack cocaine stemmed from a characteristic that rendered it much more dangerous than other cocaine-related substances: its smokeability, which makes crack intensely addictive. See pages 8-10, *supra*; see also, *e.g.*, 132 Cong. Rec. 21,229 (1986) (statement of Rep. Garcia) ("It is the use of 'smokeable cocaine,' known as crack, that has intensified the [drug] epidemic and forced everyone to take notice. Crack probably poses the greatest drug threat to users and society to date, because it is extremely addictive, with addiction taking hold even after a single use."). In addition, Congress was particularly concerned with crack cocaine because it was cheaper and simpler to make. "The recent manufacturing and distribution of crack cocaine, which has emerged in 1985 [is] * * * of great concern because it is conveniently packaged, easily and rapidly ingested by smoking, and initially affordable." *1986 S. Crack Cocaine Hearing*, *supra*, at 13 (statement of Charles R. Schuster, Ph.D, Director, National Institute on Drug Abuse). See also *Brisbane*, 367 F.3d at 912 (noting that crack cocaine is "a highly addictive form of smokable cocaine that was far cheaper than either powder or freebase had ever been").

Interpreting "cocaine base" to mean crack cocaine is the only way to give effect to Congress's clear intent that "the enhanced penalties * * * apply to crack cocaine and the lesser penalties * * * apply to all other forms of cocaine." *Gonzalez*, 608 F.3d at 1003 (quoting *Edwards*, 397 F.3d at 574).

Indeed, even the courts of appeals that have defined "cocaine base" by its broad chemical terms concede that the overall if not sole purpose of the enhanced penalty was to target crack cocaine. See *Jackson*, 968 F.2d at 162 ("It is apparent that Con-

gress in imposing the enhanced penalties was concerned with the scourge of 'crack.'"); *United States* v. *Lopez-Gil*, 965 F.2d 1124, 1134 (1st Cir. 1992) (opinion after rehearing) (conceding that "Congress indeed was concerned primarily with the crack epidemic in enacting the legislation").[17]

3. *Congress's Focus On Crack Cocaine Is Confirmed By The 1993 Sentencing Guideline Amendment.*

The U.S. Sentencing Commission's decision to define "cocaine base" as "crack" for purposes of applying the Sentencing Guidelines, see page 26, *supra*, supports adopting the same construction of clause (iii).

To be sure, this Court's holding in *Neal* v. *United States*, 516 U.S. 284 (1996), makes clear that a revision of the Guidelines by the Sentencing Commission cannot *overturn* this Court's prior interpretation of a statute. See *id.* at 295. But the Court in *Neal* also took pains to "acknowledg[e] that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts" where there has been no prior interpretation of the statute at issue. *Id.* at 290.[18]

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[17] See also *Barbosa*, 271 F.3d at 466 (noting that the 1993 Sentencing Guidelines amendment "conforms to Congress' intent to punish offenders who traffic in crack more severely"), *United States* v. *Easter*, 981 F.2d 1549, 1558 n.7 (10th Cir. 1992) ("[T]he legislative history of 21 U.S.C. § 841(b)(1) indicates that Congress amended the statute due to its concern over the increasing abuse of crack cocaine * * * .").

[18] In *Neal*, the Court found it unnecessary to determine whether any particular level of agency deference should be given to determinations by the Sentencing Commission because

This case presents just such a context. The Sentencing Commission based its 1993 amendment defining "cocaine base" as crack cocaine on a close analysis of the structure and language of the ADAA and on Congress's intent in enacting the statute. Cf. *1995 U.S.S.C. Report*, *supra*, at 116-118 (describing the statutory framework and history of the ADAA).

"Ordinarily, [this Court] resist[s] reading congressional intent into congressional inaction. But in this case, Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority * * * ." *Kimbrough*, 552 U.S. at 106 (citations omitted). "By allowing the [1993 Sentencing Commission] amendment to take effect, Congress has given its imprimatur to the new definition of 'cocaine base'; Congress indicated that it intends the term 'cocaine base' to include only crack cocaine." *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994).) (citations omitted).

C. Interpreting The Provision To Encompass All Cocaine-Related Substances That Are Chemically Basic Is Inconsistent With The Statutory Language And Structure And Would Lead To Absurd Results.

The alternative interpretation of clause (iii)—construing "cocaine base" as a technical scientific term, which would effectively encompass offenses involving every cocaine-related substance except powder and its chemical relatives—is not only inconsis-

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its holding in *Chapman* v. *United States*, 500 U.S. 453 (1991), had already interpreted the provision at issue. *Neal*, 516 U.S. at 295.

tent with the language, structure, and context of the ADAA. It also violates the fundamental canon of statutory construction that a provision may not be interpreted in a manner that makes some of the statutory language meaningless. And it leads to truly absurd results.

First, as a technical scientific term, "cocaine base" is redundant. All cocaine is chemically basic. See page 16, *supra*. Thus, if the words are construed as chemical terms of art, "base" would be superfluous—any substance qualifying as "cocaine" would necessarily be a base. Because it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute,'" *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955), this fact weighs heavily against a chemical-term-of-art approach to interpreting "cocaine base."

Second, interpreting "cocaine base" as a purely chemical term renders much of clause (ii) superfluous. Because *all* cocaine is basic, any mixture or substance containing cocaine molecules would qualify as "cocaine" under clause (ii)(II) *and* as "cocaine base" under clause (iii). But the trigger weight in clause (iii) is lower, and therefore clause (iii) would apply in every case, while clause (ii)(II) would never apply. That would render the term "cocaine" in clause (ii)(II) superfluous, making the clause meaningful only with respect to "[cocaine] salts * * * and salts of isomers [*e.g.*, cocaine hydrochloride powder]." 21 U.S.C. § 841(b)(1)(A)(ii)(II).

In other words, if all that must be shown to trigger clause (iii) is that the cocaine-related substance is chemically basic, then the 5-kilogram trigger for violations involving "cocaine" in clause (ii) would *never* apply because in every case the ten-year sen-

tence would have been triggered by the lower requirement of 50 grams. See *Edwards*, 397 F.3d at 575 ("If any form of cocaine base * * * qualifies for the enhanced penalties in the statute, then [clause] iii) swallows [clause] ii), because "cocaine base" [clause] iii) is chemically the same as "cocaine" [clause] ii)."); *United States* v. *Hollis* 490 F.3d 1149, 1156 (9th Cir. 2007) ("[C]ocaine and cocaine base are chemically identical. If any form of cocaine base qualifies for the enhanced penalties under the statute, then [clause] (iii) swallows [clause] (ii)."); see also *United States* v. *Higgins*, 557 F.3d 381, 394 (6th Cir. 2009) (quoting *Hollis*, 490 F.3d at 1156).

A strictly technical definition of the term "cocaine base" in clause (iii) would render superfluous much of clause (ii) and its use of the term "cocaine."

Third, giving "cocaine base" a scientific meaning renders § 841(b)(1)(A)(ii)(I), which addresses "coca leaves," entirely superfluous as well. That provision states that a defendant convicted of distributing coca leaves would have to distribute 5 kilograms of the leaves to trigger the ten-year mandatory minimum sentence, because the statute states that the ten-year minimum applies to "a violation * * * involving 5 kilograms or more of * * * coca leaves." 21 U.S.C. § 841(b)(1)(A)(ii)(I). But coca leaves will *always* contain chemically basic cocaine because they contain cocaine molecules in their naturally occurring, basic form. Thus, if "cocaine base" is interpreted in a strictly scientific sense, coca leaves, like cocaine, would be a "mixture or substance * * * which contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii). A defendant convicted for distribution of coca leaves would therefore have to distribute only 50 grams of leaves to trigger the ten-year minimum sentence by

operation of § 841(b)(1)(A)(iii). Such a reading renders wholly superfluous the specific provision requiring 5 kilograms of "coca leaves" to trigger the ten-year minimum: the 5 kilogram trigger for "coca leaves" would *never* apply because 1/100th of that amount of leaves would have already triggered the ten-year minimum sentence.

Similarly, under the parallel provisions of § 841(b)(1)(B) that prescribe a lesser five-year mandatory minimum sentence for lesser weights of the same controlled substances, a conviction for distribution of only 5 grams of coca leaves (as a mixture or substance "which contains cocaine base") would trigger a minimum five-year sentence. 21 U.S.C. § 841(b)(1)(B)(iii). To conceptualize what 5 grams of leaves would look like, a single nickel from the U.S. mint weighs exactly 5 grams. U.S. Mint, Coins and Medals: Nickel, http://usmint.gov/mint-prgrans /circulatingcoins/index.cfnd?action=circnickel.

This interpretation does not simply render parts of the statute superfluous; it also leads to absurd results. For example, a defendant convicted of distributing 499 grams of pure cocaine hydrochloride, ready to snort or inject, would *not* be subject to a five-year minimum (under § 841(b)(1)(B)(ii)), but a defendant convicted of distributing only a nickel's-weight handful of coca leaves, a not terribly "useful" form of the drug, *would* be subject to a five-year minimum sentence (under § 841(b)(1)(B)(iii)).

This outcome is even more bizarre when one compares the potential of these two substances to be converted into smokeable forms of cocaine. The 499 grams of pure cocaine hydrochloride (which is *not* subject to the five-year mandatory minimum) can be readily converted into *several hundred grams* of pure

smokeable cocaine with a little baking soda and water. In contrast, the nickel's-weight pinch of coca leaves (which under a technical reading of "cocaine base" *would be* subject to a five-year mandatory minimum) would require multiple solvents and other reagents to be converted into *just 0.05 grams* of pure smokeable cocaine.[19]

This Court consistently refuses to construe statutes in a manner that renders words superfluous. See *Menasche*, 348 U.S. at 538-539; *Duncan* v. *Walker*, 533 U.S. 167, 167 (2001) ("This Court's duty to give effect, where possible, to every word of a statute * * * makes the Court reluctant to treat statutory terms as surplusage."). Here, if the broader definition of "cocaine base" applies, an entire clause is effectively written out of the statute, and the results are patently absurd.

Construing "cocaine base" to mean only crack cocaine, on the other hand, provides a role for every word and clause of the statute. It is entirely consistent with—and gives effect to—the statute's separate identification and delineation of penalties for "coca leaves" and for "cocaine, its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. § 841(b)(1)(A)(ii)(I), (II).

Fourth, as Judge Posner has observed, "no reason has ever been suggested why Congress would have wanted crimes involving unprocessed cocaine to be punished more heavily than crimes involving cocaine hydrochloride." *Gonzalez*, 608 F.3d at 1003. But the unavoidable result of interpreting "cocaine

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[19] This estimate conservatively assumes that coca leaves contain 1% cocaine by weight. See page 17, note 10, *supra*.

base" as a strictly chemical term is that the amount of cocaine hydrochloride powder involved in an offense would have to be 100 times greater than the amount of its precursor unprocessed cocaine in order to trigger the same mandatory minimum penalty.

"Congress could hardly have intended to apply the enhanced penalties [of § 841(b)] to forms of cocaine base that are not smokeable or even consumable without further processing, while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride." *Brisbane*, 367 F.3d at 913. But a strictly chemical definition would require application of the higher minimum sentences even when "cocaine base" is dissolved in a liquid, *e.g.*, *Munoz-Realpe*, 21 F.3d 375,[20] is packed into fiberglass, *e.g.*, *Lopez-Gil*, 965 F.2d 1124, or is melted into a flowerpot, *e.g.*, *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993).

In addition, applying the "cocaine base" scientific definition to forms of cocaine occurring *before* the substance is processed into powder would mean that those substances would trigger the same high, mandatory penalty as crack cocaine, and would lead to much more severe punishments than the more dangerous substance—cocaine hydrochloride powder—into which they are almost always ultimately converted. There simply is no basis for interpreting the statute to lead to such absurd results.

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[20] *Munoz-Realpe* is the case in which the Eleventh Circuit switched from its broader definition of "cocaine base" as including all chemical bases to the more restrictive definition of crack cocaine. Cf. *United States* v. *Rodriguez*, 980 F.2d 1375 (11th Cir. 1992) (holding that the term "cocaine base" includes all chemical bases).

D. Defining "Cocaine Base" As Crack Cocaine Is Required By The Rule Of Lenity.

Construing "cocaine base" to refer to crack cocaine rather than to all cocaine-containing mixtures and substances that are chemically basic is mandated by the rule of lenity. Because the very most that can be said for the government's position is that clause (iii) might be ambiguous—the provision certainly does not unambiguously apply to every cocaine-related substance except powder and other cocaine salts—the rule of lenity requires adoption of the less severe construction of the statute. When a court is confronted with ambiguity in a statute meting out steep penalties to criminal defendants, "the tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). "This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348. See also *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980) ("[T]he touchstone of the rule of lenity is statutory ambiguity.").

"[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992); see also *Bifulco*, 447 U.S. at 387 ("[T]he

Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.") (citing *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979) and *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978)).

While it is not completely clear whether the rule of lenity applies as a general canon of construction or only as a last resort,[21] it is clear that lenity must break the tie if, after construing § 841(b)'s text, structure, and history, this Court cannot say with certainty that "cocaine base" refers to any and every chemically basic cocaine-related substance. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

As we have discussed, there are strong arguments arising from the statutory structure, language, and context for interpreting "cocaine base" to mean crack cocaine, and the term cannot mean "all cocaine-related substances that are chemically basic" without rendering other portions of the statute incoherent or inoperative, and without ignoring the statute's structure and clear purpose. Even if the Court is not convinced that the term "cocaine base" unam-

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[21] Compare, *e.g.*, *Bass*, 404 U.S. at 347 ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (internal citation omitted), with *Chapman*, 500 U.S. at 463 ("'[T]he rule of lenity * * * is not applicable unless there is a 'grievous ambiguity or uncertainty' * * *, such that even after a court has 'seized every thing from which aid can be derived,' it is still 'left with an ambiguous statute.'") (internal citations omitted).

biguously means crack cocaine, it cannot reasonably conclude that "cocaine base" must therefore encompass the broad range of substances urged by the government. The rule of lenity requires that the provision be interpreted to impose its dramatically heightened penalties only on offenses involving crack cocaine.[22]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

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[22] There can be no argument that this construction of clause (iii) will leave courts without sufficient guidance. To the contrary, for the past 17 years, in cases where courts' sentencing results were not controlled by a statutory mandatory minimum for "cocaine base," courts have successfully interpreted the term "crack" and applied it for purposes of calculating sentences under the Sentencing Guidelines. See, *e.g.*, *United States* v. *Bryant*, 557 F.3d 489, 499-500 (7th Cir. 2009) (reviewing different courts' application of the Guidelines definition of "crack").

Respectfully submitted.

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FRANTZ DEPIERRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioner distributed more than 50 grams of a substance that was chemically identified as containing cocaine base. The question presented is whether petitioner was correctly sentenced to a mandatory minimum ten-year term of imprisonment under 21 U.S.C. 841(b)(1)(A)(iii), which at the relevant time applied when a defendant distributed "50 grams or more of a mixture or substance * * * which contains cocaine base."

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Special Report to the Congress: Cocaine and Federal Sentencing Policy (1995) ..... *passim*

Report to the Congress: Cocaine and Federal Sentencing Policy (2007) 8, 9, 10

Webster's Third New International Dictionary of the English Language (1993) 6, 21

In the Supreme Court of the United States

No. 09-1533

FRANTZ DEPIERRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 599 F.3d 25.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 15, 2010, and was granted on October 12, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.[1]

[1] The appendix includes the versions of the statutes that were in effect during the time period at issue here. See note 7, *infra*.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of distribution of powder cocaine, in violation of 21 U.S.C. 841(a)(1), and distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A)(iii). Pet. App. 1a. Petitioner also pleaded guilty before trial to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 2a-3a. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. *Id.* at 1a, 15a; C.A. App. 25 26, 28.

Petitioner appealed, contending that his sentence was infirm because Section 841(b)(1)(A)(iii)'s reference to "cocaine base" does not embrace all cocaine classified chemically as a base but instead is limited to "crack," a street name for one particular form of cocaine base. The court of appeals affirmed. Pet. App. 1a-12a. It held that Congress's reference to "cocaine base" refers to the chemically basic form of cocaine and is not limited to "crack." *Id.* at 10a.

1. a. The Controlled Substances Act (CSA or Act), 21 U.S.C. 801 *et seq.*, establishes a comprehensive scheme for regulating controlled substances, both those substances used for legitimate medical purposes and those used for illicit purposes. See *Gonzalez* v. *Raich*, 545 U.S. 1, 10-14 (2005). The CSA makes it unlawful to manufacture, distribute, dispense, or possess a controlled substance except as authorized by its terms. See 21 U.S.C. 841(a)(1), 844(a). Penalties for violating the CSA generally depend upon the nature and amount of the controlled substance involved in the offense. See, *e.g.*, 21 U.S.C. 841(b) (2006 & Supp. III 2009), 844(a).

The CSA identifies the substances it regulates on a series of five schedules established by Congress. 21 U.S.C. 812(c).[2] The placement of a drug on a particular schedule depends upon its potential for abuse and for safe, medically accepted use. 21 U.S.C. 812(b). Those drugs with the greatest potential for abuse and no accepted safe medical use are listed on Schedule I. 21 U.S.C. 812(b)(1). Substances generally are identified on the schedules using their chemical name or, if they are plants, the common or scientific name of the plant. The schedules do not use street names or slang to identify controlled substances. Thus, the CSA identifies controlled substances such as "flunitrazepam";[3] "methamphetamine";[4] "heroin";[5] and "marihuana," including "all parts of the plant Cannabis sativa L."[6] --but does not use terms like "roofies," "meth," "smack," or "weed."

b. This case concerns cocaine-related substances, which are classified on Schedule II of the CSA. That classification reflects their high potential for abuse and severe risk of physical or psychological dependence, notwithstanding an accepted medical use. 21 U.S.C. 812(c) Sched. II(a)(4); see 21 U.S.C. 812(b)(2).

When an individual distributes a cocaine-related substance in violation of the CSA, the applicable penalty depends on the amount and particular chemical form of the substance. For any offense involving a designated

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[2] Congress also gave the Attorney General the authority to add drugs to the schedules in certain circumstances. See 21 U.S.C. 811.

[3] 21 U.S.C. 841(g)(2)(A)(iii).

[4] 21 U.S.C. 812(c) Sched. II(c).

[5] 21 U.S.C. 812(c) Sched. I(b)(10).

[6] 21 U.S.C. 802(16), 812(c) Sched. I(c)(10).

cocaine-related substance, the CSA authorizes a sentence of imprisonment up to 20 years. 21 U.S.C. 841(b)(1)(C). As relevant here, at the time of petitioner's offense conduct, conviction, and sentencing, a defendant who committed an offense involving five kilograms or more of a mixture or substance containing a detectable amount of "coca leaves," "cocaine, its salts, optical and geometric isomers, and salts of isomers," or "ecgonine, its derivatives, their salts, isomers, and salts of isomers," was subject to a sentence of ten years to life imprisonment. 21 U.S.C. 841(b)(1)(A)(ii). The same sentence applied to a defendant who committed an offense involving 50 grams or more of "a mixture or substance described in clause (ii) which contains cocaine base." 21 U.S.C. 841(b)(1)(A)(iii).[7] Thus, determining the applicable penalty in this case requires an understanding of the different chemical forms of the cocaine-related substances listed in the statute.

2. Cocaine is a powerful anesthetic and stimulant extracted from the leaves of certain plants of the genus *Erythroxylum*, generally known as coca plants, which are indigenous to the Andes Mountains of South America. John F. Casale & R.F.X. Klein, *Illicit Production of Cocaine*, 5 Forensic Sci. Rev. 95, 96-97 (1993) (Casale & Klein); Drug Enforcement Admin. (DEA), U.S. Dep't of Justice, *Coca Cultivation and Cocaine Processing: An Overview* 1 (Sept. 1993) (*Processing Overview*),

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[7] Congress recently passed legislation amending Section 841(b)(1)(A)(iii) to require 280 grams of cocaine base (as opposed to 50 grams) to trigger the ten-year mandatory minimum sentence. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372. This brief refers to the version of Section 841(b) that was in effect at the time of petitioner's offense, conviction, and sentencing.

Coca leaves must be processed or combined with other substances to have physical effects on a user. Casale & Klein 98-100; see *United States* v. *Higgins*, 557 F.3d 381, 393 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009). For example, coca leaves can be chewed along with another substance (such as lime) to produce a long-lasting, low-grade euphoria; the leaves have been used in this fashion in South America for more than 3000 years. Casale & Klein 97; United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 11, 16 (1995) (*1995 Commission Report*).

In recent decades, coca leaves have been processed into usable forms of cocaine through a multi-step chemical process that initially results in a gummy yellowish solid known as coca paste. Casale & Klein 98-101; *Processing Overview* 8-10; *Higgins*, 557 F.3d at 393. Coca paste is then refined by further chemical processing and ultimately converted into powder cocaine. Casale & Klein 101-102; *1995 Commission Report* 63, 66. Some powder cocaine is processed further into solid substances such as "freebase" or "crack." The chemical composition of these substances—coca paste, powder cocaine, "freebase," and "crack"—dictates the drugs' physical properties and the ways in which they can be used.

a. Although the word "cocaine" is commonly used to refer to a number of different forms of the drug, in chemical terms, "cocaine" has a very specific meaning. It is a molecule with the chemical formula $C_{17}H_{21}NO_4$ which represents a structural composition of seventeen carbon atoms, twenty-one hydrogen atoms, one nitrogen atom, and four oxygen atoms. See *The Merck Index:*

An Encyclopedia of Chemicals, Drugs, and Biologicals 2455, at 412 (14th ed. 2006) (*Merck Index*).[8] One important chemical property of cocaine is that it is a base. *Ibid.* That means cocaine can donate an electron pair to another molecule in a chemical reaction and will react with an acid to form a salt. See *ibid.*; *Webster's Third New International Dictionary of the English Language* 180 (1993) (*Webster's Third*) (defining "base" as "a compound (as lime, ammonia, a caustic alkali, or an alkaloid) capable of reacting with an acid to form a salt"); *United States* v. *Robinson*, 144 F.3d 104, 108 (1st Cir. 1998); Physicians & Scientists Amicus Br. 8.

Cocaine base has certain physical properties that result from its chemical structure. Cocaine base is a solid at room temperature. See *Merck Index* 2455, at 412. It is effectively insoluble in water, *ibid.*, and for that reason, it cannot be administered either by intravenous injection or by insufflation ("snorting" through the nose). See *United States* v. *Brisbane*, 367 F.3d 910, 911 (D.C. Cir.), cert. denied, 543 U.S. 938 (2004). But cocaine base can be "smoked," meaning vaporized and inhaled by the user. *1995 Commission Report* 12-14; see *Merck Index* 2455, at 412.[9]

Cocaine base is often reacted with hydrochloric acid to form cocaine hydrochloride. In that reaction, the

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[8] The chemical structure of cocaine is shown in the amicus brief. See Physicians & Scientists Amicus Br. 8.

[9] Although the practice of vaporizing and inhaling cocaine base is colloquially referred to as "smoking," that is a misnomer, because "smoking implies that the substance is burned and the smoke from the burning substance is inhaled," and cocaine base that is smoked is not burned but is "vaporized, much like water is vaporized when it boils, and the cocaine-laden vapor is inhaled into the lungs." *1995 Commission Report* 12 n.28.

base donates its free electron pair to the acid and forms a salt. Casale & Klein 101-102; *1995 Commission Report* 12; see Physicians & Scientists Amicus Br. 8-9. Cocaine hydrochloride has the chemical formula $C_{17}H_{21}NO_4 \cdot HCl$ and a chemical structure comprised of seventeen carbon atoms, twenty-two hydrogen atoms, one nitrogen atom, four oxygen atoms, and one chlorine atom. See *Merck Index* 2455, at 413; *1995 Commission Report* 12.[10]

Cocaine hydrochloride often exists as a white or off-white powder. Unlike cocaine base, cocaine hydrochloride readily dissolves in water, see *Merck Index* 2455, at 413, and so it can be injected or insufflated. See, *e.g.*, *Higgins*, 557 F.3d at 393. Cocaine hydrochloride cannot be vaporized and inhaled, however, because it begins to decompose at its vaporization point, becoming "inactive pharmacologically and no longer produc[ing] any physiological or psychotropic effects." *1995 Commission Report* 12-13.

b. The chemical reaction converting cocaine base to a cocaine salt—and vice versa—is used at several points during the cocaine production and distribution process.

That process typically begins with macerating wet coca leaves with lime (a base) to extract cocaine base. An organic solvent (such as kerosene or gasoline) is added, and the cocaine base dissolves into the organic solvent. See Casale & Klein 98. The coca leaves are removed, and an acid and water are added to form a cocaine salt. *Id.* at 98-99. Then lime or another base is added to form cocaine base, which appears as a gummy yellowish solid known as "coca paste." *Ibid.* Coca paste

[10] The chemical structure of cocaine hydrochloride is shown in the amicus brief. See Physicians & Scientists Amicus Br. 9.

is "smoked" in some South American countries and was used in that manner in certain cities in the United States during the early 1980s. *1995 Commission Report* 11-12.

A great majority of coca paste, however, is processed further and is ultimately converted into the hydrochloride salt, that is, the powder form. That process involves adding hydrochloric acid to the cocaine base (dissolved in an organic solvent) to produce cocaine hydrochloride. United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 62 (2007) (*2007 Commission Report*). The cocaine hydrochloride precipitates (solidifies) out of the solution and is dried to yield cocaine hydrochloride powder. *Ibid.* Most cocaine that enters the United States is in the powder form. See *1995 Commission Report* 63, 66.

Cocaine hydrochloride is often processed further to appeal to users who wish to smoke it, rather than inject or insufflate it. This is accomplished by reacting cocaine hydrochloride with a base, thereby converting it back to cocaine base. One processing technique for the conversion is colloquially known as "freebasing." *1995 Commission Report* 13; *Higgins*, 557 F.3d at 393. This method involves dissolving cocaine hydrochloride powder in water, adding a base such as ammonia, and then adding ether. The cocaine hydrochloride reacts with the base to yield cocaine base and other substances; the base dissolves in the ether, which is separated from the water; and then the ether is evaporated off and the cocaine base is dried so it can be smoked. The resulting product is colloquially known as "freebase" or "freebase cocaine." See, *e.g.*, *United States* v. *Edwards*, 397 F.3d 570, 574 (7th Cir. 2005). Cocaine base prepared in this way was used by "ten to 20 percent of the cocaine-abus-

ing population" in the 1970s, *1995 Commission Report* 13, but it has declined in popularity because the preparation process is somewhat complex and quite dangerous. Ether is highly volatile, and it will "ignite or explode if the freebase cocaine is smoked before the ether has evaporated entirely"—as famously demonstrated in 1980 when the comedian Richard Pryor suffered severe burns while "freebasing" cocaine. *Ibid.*

Another processing technique for converting cocaine hydrochloride back into cocaine base is known colloquially as "cooking" powder cocaine into "crack." In that process, cocaine hydrochloride powder is dissolved in hot water, and then a weak base, such as baking soda (sodium bicarbonate) or household ammonia, is added. *2007 Commission Report* 62-63; *1995 Commission Report* 14; *Processing Overview* 9. The base reacts with cocaine hydrochloride to form cocaine base and other substances. *Processing Overview* 9. Cocaine base precipitates out of the water; the water is heated and the cocaine base melts into an oil; that oil solidifies as the mixture cools. *Ibid.* This solid is removed from the liquid, dried, broken or cut into small off-white chunky "rocks," and sold on the street as "crack" or "crack cocaine." *1995 Commission Report* 14. This process is simpler and safer than the "freebasing" process, and it has become the prevailing method in the United States for illicit conversion of cocaine hydrochloride powder into cocaine base.

c. The method by which cocaine is consumed determines the onset, intensity, and duration of the drug's physiological and psychotropic effects. *1995 Commission Report* 7, 9, 11, 14, 23; Casale & Klein 96-97. The more rapidly the drug reaches the brain, the more in-

tense the effect, but the shorter the duration of the effect. *1995 Commission Report* 24; see Nat'l Inst. on Drug Abuse, *NIDA Info Facts: Cocaine*, http://nida.nih.gov/infofacts/cocaine.html.

Injected cocaine hydrochloride or smoked cocaine base reaches the brain most quickly, but it has short-lasting effects. For that reason, users of cocaine who inject or smoke it are more likely to "administer the drug more frequently" to sustain the intense highs; this in turn increases the likelihood of developing an addiction. *2007 Commission Report* 63-64; *1995 Commission Report* 24. By contrast, when cocaine hydrochloride is insufflated, the effects are "slow in onset, longer acting, and less likely to involve administering the drug frequently." *1995 Commission Report* 24. Because cocaine base can only be smoked, it is generally regarded as more addictive than cocaine hydrochloride (powder cocaine), which typically is insufflated. See *2007 Commission Report* 66-67; *Kimbrough* v. *United States*, 552 U.S. 85, 94, 98 (2007).

3. In January 2005, petitioner called a man who, unbeknownst to petitioner, was a confidential informant for the government and offered to sell him crack cocaine. Pet. App. 2a. The informant, a former drug dealer, was working with federal agents to investigate drug and firearm sales in the Boston area. *Ibid.* In a follow-up recorded call initiated by the informant, petitioner confirmed that he had "the cookies," a slang term for crack cocaine, but also used the word "riggedy," a slang term for powder cocaine. *Ibid.*; see Gov't Supp. C.A. App. 155-156. The informant asked petitioner if he could "chef [the cocaine] up," *i.e.*, "cook" it into "crack,"

and petitioner said he would. Gov't Supp. C.A. App. 28, 156; see Pet. App. 2a; C.A. App. 67.

Despite the informant's request that petitioner "chef up" the cocaine, petitioner sold the informant only powder cocaine at their next meeting. Pet. App. 2a; Gov't Supp. C.A. App. 30, 158, 160-162, 291, 294, 325-326. In later conversations, the informant specified that next time he wanted crack, not powder cocaine. Pet. App. 2a. The informant met with petitioner a few days later, but petitioner could not sell the informant crack at that time because he had left the equipment needed for cooking powder cocaine into crack at his girlfriend's house. See Gov't Supp. C.A. App. 124-125, 252-254.

In April 2005, petitioner and the informant discussed another drug deal, with the informant asking for "flago," another slang term for crack; stating that he wanted petitioner to "chef" it; and emphasizing that he did not want cocaine powder. Gov't Supp. C.A. App. Br. 173-174; C.A. App. 69-71. Petitioner then sold the informant two bags of drugs for $1800. Gov't Supp. C.A. App. 54-55, 184, 298; Pet. App. 2a. The bags contained an off-white chunky substance. Gov't C.A. Supp. App. 298, 336. Laboratory testing determined that the substance in the bags contained cocaine base, weighed 55.1 grams in total, and was 40% pure. Pet. App. 2a; Gov't C.A. Supp. App. 331-335. Sodium bicarbonate was not found in the sample in detectable amounts. Gov't C.A. Supp. App. 342-345 (government chemist's testimony).

4. Petitioner was indicted and proceeded to a jury trial on two drug counts: one charging distribution of powder cocaine, and one charging distribution of 50

grams or more of cocaine base. Pet. App. 1a-3a; see C.A. App. 14-24 (indictment).[11]

a. At trial, petitioner asked the district court to instruct the jury that to find him guilty of distribution of cocaine base, it had to find beyond a reasonable doubt that he "distributed the form of cocaine base known as crack cocaine." C.A. App. 53. Petitioner's proposed jury instruction defined "crack" as follows:

> "Crack" is a street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

Id. at 53-54. Petitioner also asked that the jury be instructed that "[c]hemical analysis cannot establish a substance as crack because crack is chemically identical to other forms of cocaine base, although it can reveal the presence of sodium bicarbonate, which is usually used in the processing of crack." *Id.* at 53-54. At the instructions conference, petitioner reiterated his position that the reference to "cocaine base" in 21 U.S.C. 841(b)(1)(A)(iii) required a finding that he possessed "crack cocaine." Gov't C.A. Supp. App. 355-358.[12]

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[11] Petitioner was also indicted on, and pleaded guilty before trial to, one count of possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 2a-3a.

[12] Although the jury in this case was instructed to decide if the offense involved 50 grams or more of "cocaine base" for purposes of the mandatory minimum sentence in 21 U.S.C. 841(b)(1)(A), that issue may be resolved by the court rather than a jury. Drug quantity need not be decided by a jury when it results in an increase in a mandatory minimum sentence, so long as the defendant is not sentenced above the otherwise-applicable statutory maximum sentence. See *United States* v. *Pineda-Buenaventura*, 622 F.3d 761, 774 (7th Cir. 2010); *United*

The district court rejected petitioner's proposed instruction, holding, based on circuit precedent, that "cocaine base" is "the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine." Gov't C.A. Supp. App. 359. The court instructed the jury that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." *Id.* at 428. The jury found petitioner guilty on both counts, specifically finding that he had distributed 50 grams or more of "cocaine base." Pet. App. 1a; Gov't Supp. C.A. App. 468 (verdict).

b. The Presentence Investigation Report (PSR) calculated petitioner's offense level under Sentencing Guidelines § 2D1.1 (2006). PSR ¶¶ 21-22. For the purpose of that Guidelines provision, "'[c]ocaine base" * * * means 'crack,'" and "crack" is defined as "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." Sentencing Guidelines § 2D1.1(c) (n.D) (2006). The PSR determined that the cocaine base in petitioner's case was "crack," and it therefore held him accountable for 61.7 grams of powder cocaine and 55.1

States v. *Webb*, 545 F.3d 673, 678 (8th Cir. 2008), cert. denied, 129 S. Ct. 2013, and 129 S. Ct. 2021 (2009); *United States* v. *Toliver*, 351 F.3d 423, 430 (9th Cir. 2003), cert. denied, 541 U.S. 1079 (2004); *United States* v. *Goodine*, 326 F.3d 26, 27-34 (1st Cir. 2003), cert. denied, 541 U.S. 902 (2004); *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc), cert. denied, 535 U.S. 942 (2002); but see *United States* v. *Branham*, 515 F.3d 1268, 1275-1276 (D.C. Cir. 2008); *United States* v. *Gonzalez*, 420 F.3d 111, 122-125 (2d Cir. 2005); *United States* v. *Martinez*, 277 F.3d 517, 528 (4th Cir.), cert. denied, 537 U.S. 899 (2002); but cf. *United States* v. *Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003).

grams of cocaine base. PSR ¶ 22. That yielded an offense level of 30, PSR ¶¶ 23-24, 29, 46, which, combined with petitioner's criminal history category of III, gave petitioner an advisory Guidelines range of 121 to 151 months of imprisonment, PSR ¶¶ 55, 93. The PSR also noted that because petitioner was convicted of an offense involving "50 grams or more of * * * cocaine base," he was subject to a mandatory minimum sentence of 120 months under 21 U.S.C. 841(b)(1)(A)(iii). See PSR ¶ 92.

Significantly, petitioner did not object to the PSR's finding that the cocaine base at issue in his case was "crack." In his sentencing memorandum, petitioner acknowledged that his "conviction for distributing over 50 grams of crack cocaine would normally mandate a 10 year sentence," C.A. App. 55, but argued that the court should nonetheless impose a sentence in a range of 41-51 months because, in his view, the government had engaged in impermissible sentencing factor manipulation through the informant's "repeated[]" requests that petitioner "cook the cocaine into crack," *id.* at 57.

At sentencing, the district court determined that 121 to 151 months was the applicable advisory Guidelines range. 8/8/2008 Sent. Tr. 39-40. The court rejected petitioner's claim of impermissible sentencing factor manipulation. *Id.* at 37-39. The court then varied from the advisory Guidelines range of 121-151 months, finding that the mandatory minimum sentence of 120 months required under 21 U.S.C. 841(b)(1)(A)(iii) for offenses involving 50 grams or more of cocaine base sufficed to accomplish the sentencing goals set forth in 18 U.S.C. 3553(a). 8/8/2008 Sent. Tr. 39-43.

5. The court of appeals affirmed. Pet. App. 1a-12a. As relevant here, petitioner attacked his ten-year sentence on the ground that the term "cocaine base" in 21 U.S.C. 841(b)(1)(A)(iii) "should be read to apply only to that form of cocaine base called crack." Pet. App. 9a. The court rejected that claim, explaining that Section 841(b)(1)(A) "refer[s] explicitly to 'cocaine base'" and should not be "judicially restricted to only the specific form of cocaine base known as crack." *Id.* at 10a. The court acknowledged that some courts of appeals had limited "cocaine base" to "crack," *id.* at 9a & n.3, but adhered to circuit precedent, which had "read the statute according to its terms" to hold that "cocaine base" in Section 841 refers to "'all forms of cocaine base, including but not limited to crack cocaine.'" *Id.* at 10a (quoting *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir.), cert. denied, 549 U.S. 1068 (2006)).

SUMMARY OF ARGUMENT

"Cocaine base" in the CSA's penalty provisions means the chemically basic form of cocaine, which is readily identifiable using standard techniques of chemical analysis. It does not mean the street term "crack," which is an imprecise word that would exclude substances that the statute was intended to cover.

A. The penalty provision at issue here, 21 U.S.C. 841(b)(1)(A)(iii), refers to "cocaine base," and "cocaine base" has a plain, unambiguous meaning: the form of cocaine classified chemically as a base. Although "crack" is one form of "cocaine base," nothing in the statute limits its reach to the particular form of cocaine base known on the street as "crack." Indeed, the term "crack" is not used anywhere in the CSA. If Congress

had wanted to limit the sentencing provision to "crack," it easily could have said so.

B. The use of the chemical definition of "cocaine base" is supported by the CSA's overall approach to identifying controlled substances. The CSA identifies the substances it regulates using chemical and botanical terminology; it does not use street names. Giving "cocaine base" its settled chemical meaning is fully consistent with that approach; limiting "cocaine base" to the undefined street term "crack" is not.

C. Giving "cocaine base" its plain meaning is consistent with the statute's history and purposes. Congress added enhanced penalties for cocaine base to the CSA in 1986, after learning that drug traffickers were processing powder cocaine into new forms of cocaine that could be consumed in a way—smoking—that would give users a more intense high. Congress was prompted to act principally because of the emergence of "crack," but it was also aware of, and concerned about, other forms of cocaine base, including coca paste and "freebase." Those other forms of cocaine base can be smoked, and they are chemically and pharmacologically the same as "crack."

There is no reason to believe that Congress would have used the chemical term "cocaine base" to cover only the type of cocaine base known as "crack." That is especially true because, in the same bill that included the 1986 Act, Congress criminalized trafficking in controlled substance analogues—substances that are chemically and pharmacologically similar to listed controlled substances.

D. Petitioner's approach, which relies on a street name to impose extra-textual limitations on the term

"cocaine base," would create ambiguities and practical difficulties. Although petitioner argues that "cocaine base" means "crack," he does not advocate any specific definition of "crack." The experience in the federal courts demonstrates a lack of consensus on the meaning of that street term. Moreover, by focusing on production methods, rather than the chemical form of the drug involved, petitioner's approach would create incentives for innovative drug traffickers to find other means of production of "cocaine base" to avoid the penalties set out for that substance in the CSA.

E. Petitioner's other arguments for limiting "cocaine base" to "crack" lack merit. Contrary to petitioner's submission, the government's view does not create superfluities or absurd results. Nor does the Sentencing Guidelines' definition of "cocaine base" inform that term's meaning in the United States Code. That definition is expressly limited to the Guidelines context. Congress has not delegated to the Commission the task of construing the term "cocaine base," and Congress's failure to disapprove the Commission's definition is not an approval of the definition for statutory purposes. Indeed, such a definition would make little sense in the context of the statute, where controlled substances are identified based on their chemical makeup.

F. The rule of lenity has no application here. The term "cocaine base" is not itself ambiguous—it has a settled scientific meaning—and the focus on "crack" in the legislative record does not create the type of grievous ambiguity that could make resorting to the rule of lenity appropriate.

ARGUMENT

THE TERM "COCAINE BASE" IN 21 U.S.C. 841(b)(1) REFERS TO ALL SUBSTANCES CHEMICALLY IDENTIFIED AS COCAINE BASE

In the sentencing provisions of the Controlled Substances Act, Congress provided for an enhanced penalty if the defendant's offense involves "cocaine base." The question in this case is whether "cocaine base" should be interpreted using its settled, unambiguous scientific meaning—the form of cocaine classified chemically as a base—or should be limited to one particular form of cocaine base known by the street name "crack." The statute's text answers this question: the enhanced penalties apply to an offense involving any form of "cocaine base." Application of the settled scientific meaning of "cocaine base" is consistent with the CSA's overall approach, which defines substances based on chemical and botanical terms, rather than street names, and it is consistent with Congress's purposes. Injecting street names into the CSA as petitioner proposes would raise a number of definitional uncertainties and practical difficulties. Petitioner provides no good reason to ignore the statute's plain language. The judgment below should be affirmed.

A. The Statutory Text Refers To "Cocaine Base," Not "Crack"

"The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989); see *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009). Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Ron Pair*,

489 U.S. at 241 (internal quotation marks omitted). The statutory text here is clear.

1. Section 841(b) of Title 21 sets out the applicable penalties for a person who has distributed a controlled substance in violation of federal law. 21 U.S.C. 841(a). The penalty that applies depends on amount and type of the chemical involved.

At the time of petitioner's offense, Section 841(b)(1)(A) provided that an individual who distributes a controlled substance is subject to a ten-year minimum sentence if his offense involves:

> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –
>
> (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
>
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
>
> (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
>
> (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); [or]
>
> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base[.]

21 U.S.C. 841(b)(1)(A). By their plain terms, Clause (ii) describes a variety of cocaine-related substances regu-

lated by the Act, and Clause (iii) then provides for a reduced quantity threshold in the event that the particular cocaine-related substance involved in the offense is "cocaine base."

2. The meaning of "cocaine base" in the CSA is clear. "Cocaine base" has a settled, unambiguous scientific meaning: it is the form of cocaine classified chemically as a base, with the chemical formula $C_{17}H_{21}NO_4$ and a particular molecular structure, see *Merck Index* 2455, at 412; *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir.), cert. denied, 506 U.S. 1024 (1992), and it may be readily identified by chemical analysis, see, *e.g.*, *United States* v. *Easter*, 981 F.2d 1549, 1558 (10th Cir. 1992), cert. denied, 508 U.S. 953 (1993). Congress did not define cocaine base to mean anything else, nor did it limit cocaine base to "crack."

Cocaine base is distinct from cocaine hydrochloride, a salt form of cocaine, which has a different chemical formula, a different molecular structure, and different physical properties. See *Jackson*, 968 F.2d at 161; see also *United States* v. *Edwards*, 397 F.3d 570, 574 (7th Cir. 2005); *United States* v. *Robinson*, 144 F.3d 104, 108 (1st Cir. 1998). In choosing the term "cocaine base," Congress "chose[] a scientifically precise method of determining which substances are subject to enhanced penalties." *United States* v. *Palacio*, 4 F.3d 150, 153 (2d Cir. 1993), cert. denied, 510 U.S. 1166 (1994).

In interpreting Section 841(b)(1)(A)(iii), this Court should give the term "cocaine base" its settled scientific meaning. The Court has long recognized that when Congress uses a technical, scientific, or other term of art in a statute without providing an explicit definition, the phrase should be given meaning by reference to the ap-

propriate art or science. See *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 613-614 (1992); *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201 (1974); *O'Hara* v. *Luckenbach S.S. Co.*, 269 U.S. 364, 370-371 (1926). Giving "cocaine base" its settled scientific meaning makes particular sense here, where the entire statutory scheme uses chemical and botanical terms of this type, rather than street names or slang. See pp. 24-27, *infra*.

It is true that the term "cocaine base" is somewhat redundant, because chemically "cocaine" *is* basic. See Pet. Br. 39; Physicians & Scientists Amicus Br. 13-14; see also *Merck Index* 2455, at 412; pp. 5-6, *supra*. But that provides no basis for casting aside the plain meaning of "cocaine" and "base" or the "chemical-term-of-art approach" (Pet. Br. 39) that pervades the CSA. Congress reasonably decided to add the word "base" to clarify that it was referring to the chemically basic form of cocaine, as opposed to the salt form of the drug that might colloquially be referred to as "cocaine." See *Webster's Third* 180 (defining "base" as "a compound * * * capable of reacting with an acid to form a salt"); see also, *e.g.*, Pet. Br. 17-18 (differentiating between base and salt forms of cocaine). That is, simply referring to "cocaine" in Clause (iii) erroneously might have led some to believe that Clause (iii) reached, for example, powder cocaine. Contrary to petitioner's suggestion (Br. 39), Congress's addition of the word "base" clarifies, rather than obscures, the meaning of the term "cocaine base." By referring to "cocaine base," Congress achieved both chemical accuracy and practical clarity. The addition of the chemical term "base" also reinforces Congress's in-

tent to use scientific concepts and terms to avoid confusion that could result from reliance on colloquial terms.

3. Petitioner contends (Br. 28) that the term "cocaine base" refers only to the particular form of "cocaine base" known on the street as "crack." There is no textual basis for such a limitation. As petitioner acknowledges, "crack" is one form of "cocaine base." *Id.* at 19. There are other usable forms of the drug where cocaine exists in its base form, such as coca paste (see pp. 7-8, *supra*) and "freebase" (see pp. 8-9, *supra*). By its plain terms, the statute encompasses all of these forms.

Congress did not define "cocaine base" as "crack" in the statute; indeed, it did not refer to "crack" anywhere in the CSA. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Dean*, 129 S. Ct. at 1853 (citation omitted). Here, the "proper inference [to] draw from Congress' use of the chemical term 'cocaine base,' without explanation or limitation, is that [Congress] intended the term to encompass all forms of cocaine base." *United States* v. *Barbosa*, 271 F.3d 438, 466 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002). It would be odd to limit the scope of Section 841(b)(1)(A)(iii) to only one particular form of "cocaine base" using a street term that appears nowhere in the statute. It would be odder still to do so where, as here, the street term lacks a settled meaning and petitioner does not define it. See pp. 35-40, *infra*.

4. If Congress had wanted to limit the scope of Section 841(b)(1)(A)(iii) to "crack" cocaine, it could easily have done so. Congress was aware when it enacted the provision at issue that not all cocaine base was "crack." See pp. 29-31, *infra*. Had Congress intended to limit the provision's scope to "crack," Congress could have re-

ferred to "crack," or "crack cocaine," or "that form of cocaine base commonly known as 'crack' cocaine" in Section 841(b)(1)(A)(iii). Or it could have expressly defined "cocaine base" as "crack" in the lengthy list of definitions in the Act, 21 U.S.C. 802. See, *e.g.*, 21 U.S.C. 802(16) (defining "marihuana"); 21 U.S.C. 802(18) (defining "opiate"); 21 U.S.C. 802(41) (defining "anabolic steroid"); see also Sentencing Guidelines § 2D1.1(c) (n.D) (defining "cocaine base" as "crack"). But "Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)). Instead, it used the broader, more inclusive chemical term "cocaine base." This Court should "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Where Congress chooses to use a broad term without qualification or limitation, this Court gives effect to the language Congress chose. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008) ("Had Congress intended to limit [28 U.S.C.] § 2680(c)'s reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity*.' Instead, it used the unmodified, all-encompassing phrase 'any other law enforcement officer.' Nothing in the statutory context requires a narrowing construction."); see also, *e.g.*, *Ron Pair*, 489 U.S. at 242 n.4; *United States* v. *Turkette*, 452 U.S. 576, 581 (1981). Here, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage." *Custis* v. *United States*, 511 U.S. 485, 493, 501 (1994) (citations omitted). Section 841(b)(1)(a)(A)(iii) applies to "exactly what its

terms suggest: the possession of any form of 'cocaine base.'" *United States* v. *Medina*, 427 F.3d 88, 92 (1st Cir. 2005).

B. Giving "Cocaine Base" Its Plain Chemical Meaning Is Consistent With The Act's Overall Approach For Identifying Controlled Substances

Interpreting "cocaine base" using its unambiguous scientific meaning makes particular sense in light of the statute as a whole. The CSA generally identifies controlled substances using chemical or botanical names, not street terms. Interpreting "cocaine base" to mean only "crack" would cast aside Congress's chosen method for identifying controlled substances in favor of a street term that appears nowhere in the CSA.

1. The CSA elaborately identifies the substances it covers. Congress defined these substances in a series of five initial schedules, 21 U.S.C. 812(c), and it authorized the Attorney General to add drugs to the schedules in certain circumstances, 21 U.S.C. 811. Congress consistently identified substances the CSA covers using chemical and botanical terminology, not street names.

Chemical terminology is the standard vocabulary of the CSA. The schedules refer to the terms used to identify drugs as "specific chemical designation[s]." 21 U.S.C. 812(c). Consistent with that self-characterization, 139 of the 145 distinct substances listed by Congress on the five schedules in 21 U.S.C. 812(c) are directly identified by their recognized chemical names or by formal chemical nomenclature.[13] Of the six remaining

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[13] Chemical information—including chemical formula, chemical structure, and literature references—for nearly every entry on the CSA

scheduled controlled substances, one is "anabolic steroids," 21 U.S.C. 812(c) Sched. III(e), which is defined in 21 U.S.C. 802(41) to include dozens of substances identified by their formal chemical names and other "hormonal substance[s], *chemically* and pharmacologically related to testosterone," 21 U.S.C. 802(41)(A) (emphasis added). And the remaining five scheduled substances refer to plants or plant products. Most of these are defined by formal botanical classification, its own scientific art.[14]

The CSA does not define the substances it regulates using street terms. Congress did not list "smack" or "horse" as a proscribed Schedule I substance; rather, it listed "any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation," including "heroin." 21 U.S.C. 812(c) Sched. I(b)(10). Similarly, Congress did not refer to "pot," "grass," or "weed"; it identified the substance as "marihuana," 21 U.S.C. 812(c) Sched. I(c)(10), and then further defined that term using its formal botanical classification, 21 U.S.C. 802(16) ("marihuana" includes "all parts of the plant Cannabis sativa L."). These examples demonstrate that

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Schedules can be readily retrieved by name from the National Center for Biotechnology Information's *PubChem* compound database, http://pubchem.ncbi.nlm.nih.gov.

[14] The five botanically based entries are: marihuana, 21 U.S.C. 812(c) Sched. I(c)(10); 21 U.S.C. 802(16) (further defining marihuana in botanical terms); peyote, 21 U.S.C. 812(c) Sched. I(c)(12) (peyote); see 21 C.F.R. 1308.11(d)(25) (further defining peyote in botanical terms); opium poppy and opium, 21 U.S.C. 812(c) Sched. II(a)(1) and (3); see 21 U.S.C. 802(19) (20) (further defining opium-related substances in botanical terms); and coca leaves, 21 U.S.C. 812(c) Sched. II(a)(4).

in enacting the CSA, Congress made a conscious choice to identify controlled substances using scientific terms, including chemical and botanical terms. The choice to avoid reliance on undefined street terms makes sense, especially because some street names refer to more than one controlled substance. See, *e.g.*, Office of Nat'l Drug Control Policy, *Street Terms: Drugs and the Drug Trade, Drug Type*, http://www.whitehousedrugpolicy.gov/streetterms ("[r]acehorse charlie" refers to heroin or cocaine; "ready rock" refers to powder cocaine, crack cocaine, or heroin; "white dragon" refers to powder cocaine or heroin). Nothing in the text of the CSA supports petitioner's assertion (Br. 25) that Congress "looked to terms used in the drug trade in crafting the statutory language."

2. Giving "cocaine base" its settled chemical meaning is consistent with the statute's general approach to identifying controlled substances based on their chemical and botanical names. Like the vast majority of other substances listed in the schedules, "cocaine base" is "a chemical term * * * whose meaning is undisputed in the scientific community." *Jackson*, 968 F.2d at 163. It has a definite chemical formula and a particular chemical structure, which gives it certain physical properties that readily distinguish it from cocaine hydrochloride. See pp. 5-7, *supra*. Courts have widely recognized the difference between these two substances. See, *e.g.*, *Edwards*, 397 F.3d at 574; *Robinson*, 144 F.3d at 108; *United States* v. *Booker*, 70 F.3d 488, 491 & n.17 (7th Cir. 1995), cert. denied, 517 U.S. 1111 (1996).

Because Congress "chose[] a scientifically precise method of determining which substances are subject to enhanced penalties," *Palacio*, 4 F.3d at 153, it would be

inappropriate to cast aside that method and define "cocaine base" to mean "crack." Nor, for that matter, would it be appropriate to read "cocaine base" to mean "basuco," "yam," "twinkie," "bopper," or any of dozens of other street terms for cocaine base. See Office of Nat'l Drug Control Policy, *Street Terms: Drugs and the Drug Trade, Drug Type: Cocaine*, http://www.whitehousedrugpolicy.gov/streetterms/ByType.asp?intTypeID=3; see also Gov't C.A. Br. 6-7 (petitioner's references to cocaine base as "cookies" and "flago").

C. Interpreting "Cocaine Base" To Include All Chemically Basic Forms Of Cocaine Is Consistent With The Statute's History And Purposes

Petitioner contends (Br. 26) that "cocaine base" should be limited to "crack" because "Congress's purpose was to target crack cocaine." When the language of a statute is clear, as it is here, the legislative history of the statute may not be employed as a tool for generating uncertainty. See *Boyle* v. *United States*, 129 S. Ct. 2237, 2246 2247 (2009).

In any event, the statute's history and purposes support use of the plain meaning of "cocaine base." Although concerns about the prevalence of "crack" initially spurred Congress to action, the legislative history reveals an awareness that "crack" was only one form of cocaine base and that other forms (such as "freebase" and coca paste) were just as dangerous as crack. Congress's decision to reach all forms of "cocaine base" therefore was an informed one.

1. In 1986, Congress passed the Narcotics Penalties and Enforcement Act of 1986 (1986 Act), Pub. L. No. 99-570, Tit. I, Subtit. A, 100 Stat. 3207-2. That Act increased the penalties for drug trafficking, calibrated

to the quantity of drugs involved. See *id.* § 1002, 100 Stat. 3207-2 (codified in relevant part at 21 U.S.C. 841(b)(1)(A)(i)-(vii) and (B)(i)-(vii)). In the 1986 Act, Congress for the first time distinguished drug-trafficking crimes involving "cocaine base" from those involving other forms of cocaine, and it determined that crimes involving cocaine base should be subject to more severe penalties. See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (B)(ii)-(iii).[15]

Petitioner is correct that the Congress that enacted the 1986 Act was prompted to act by a concern about "crack." See, *e.g.*, *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 1 (1986) (*Crack Cocaine Hearing*) ("[The Committee] meets today to examine a frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack.'"). But it does not follow that the resulting legislation touched no more than "crack." "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

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[15] Both the House and the Senate had a version of a bill to amend the penalty provisions. The House version used the phrase "cocaine free-base" (see H.R. 5394, 99th Cong., 2d Sess. § 101 (1986)), while the Senate version used the phrase "cocaine base" (see S. 2878, 99th Cong., 2d Sess. § 1002 (1986)). The Senate version ultimately was enacted. See *Jackson*, 968 F.2d at 162.

As explained below, giving "cocaine base" its accepted chemical meaning reaches both "crack" and "reasonably comparable evils," *Oncale*, 523 U.S. at 79, such as "freebase" and coca paste. That is an entirely natural result; "[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (internal quotation marks omitted). As petitioner himself acknowledges (Br. 13), Congress took a "wide-ranging approach to combat drug abuse" in 1986. 132 Cong. Rec. 22,948-22,949 (1986) (statement of Rep. Young).

2. At the time it enacted the 1986 Act, Congress was aware that "cocaine base" was a broader category than "crack." At a Senate subcommittee hearing that preceded passage of the 1986 Act, witnesses explained that the term "crack" described only one particular form of cocaine base. Dr. Charles Schuster, the Director of the National Institute on Drug Abuse, explained that different methods could be used to prepare cocaine base and that the term "crack" was descriptive of the result of only one of those methods:

> [I]f cocaine is to be smoked, it must be converted into its free-base form. Previously, an alkali, such as ammonia, or bicarbonate of soda, was added to cocaine hydrochloride to form the cocaine base and then extracted using a solvent such as ether. However, individuals who were preparing free-base discovered that they didn't have to go through this costly and dangerous extraction process with ether, but rather they could simply precipitate the free-base and remove that, and it forms a waxy kind of material, which can be smoked to deliver cocaine. * * * In

> other words, crack is simply a street name for smokable cocaine free-base, prepared by a method which does not involve solvents.

Crack Cocaine Hearing 14. Similarly, in a prepared statement, Dr. Robert Byck, a Professor of Psychiatry and Pharmacology at Yale University School of Medicine, distinguished between crack and other forms of cocaine: "'[c]rack' is a crudely derived form of * * * free base of cocaine" but "[t]he free base is also present in cocaine 'paste' which is an intermediate product in producing the hydrochloride salt." *Id.* at 87.

Congress not only was informed about other forms of cocaine base than "crack," but it also learned that those substances were "smoked" in a manner similar to crack. Dr. Byck noted that coca paste, a form of cocaine base, may be smoked and "has been used in South America and in this country for at least fifteen years." *Crack Cocaine Hearing* 87. He reported coca paste use "in Los Angeles, San Francisco and other cities" as early as 1980. Sidney Cohen, *Coca Paste and Freebase: New Fashions in Cocaine Use*, Drug Abuse & Alcoholism Newsl., Apr. 1980, at 1 (cited in *Crack Cocaine Hearing* 91 (statement of Robert Byck, M.D.)) (*Coca Paste and Freebase*). Congress was also well aware of the illicit use of "freebase" cocaine in light of recent high-profile accidents with that drug. *Crack Cocaine Hearing* 2 (noting that "free-basing cocaine * * * was the cause of Richard Pryor's burns in 1980 and a suspected cause of Len Bias' death last month") (opening statement of Chairman William V. Roth, Jr.); see also, *e.g.*, 132 Cong. Rec. at 23,002 (statement of Rep. Lantos); *id.* at 4418 (quoting Tom Morganthau et al., *Kids and Cocaine*, Newsweek, Mar. 17, 1986, at 58). Dr. Schuster de-

scribed the methodology for producing "freebase" cocaine and explained that it was a commonly used form of cocaine base before the emergence of crack. *Crack Cocaine Hearing* 14; see *1995 Commission Report* 13 ("freebase" was used by "ten to 20 percent of the cocaine-abusing population" in the 1970s); see also Pet. Br. 18-19.

Petitioner's citations to the legislative record show that Congress was concerned about the particular form of cocaine base known as "crack," but they do not establish that Congress's concern was limited to that form of the drug. Given Congress's awareness that "crack" described only one type of cocaine base, and that other forms of cocaine base were used in a manner similar to crack, Congress's choice of the inclusive term "cocaine base" should be understood to reach cocaine base in all of its forms.

3. Giving "cocaine base" its plain scientific meaning is consistent with Congress's purposes in the 1986 Act. Congress was concerned about the proliferation of "crack" because that drug could be smoked, rather than injected or insufflated, because it gave users an usually intense high, and because the short duration of that high made the substance extremely addictive. See, *e.g.*, *Kimbrough* v. *United States*, 552 U.S. 85, 95-96 (2007); 132 Cong. Rec. at 30,470 (statement of Sen. Hawkins) ("[Powder cocaine] can be processed into freebase and crack, which is smoked. Younger people * * * are attracted to the smokeable forms."); *1995 Commission Report* 14-15 (comparing different means of administering cocaine-related substances). But, as Congress was aware, "crack" is not the only form of cocaine base that may be smoked. Coca paste and "freebase" may also be

smoked, and they pose the same dangers as "crack." Nothing suggests that Congress, which was concerned about the "drug use * * * epidemic" (132 Cong. Rec. at 22,991 (statement of Rep. Dorgan)), would have exempted these materials from its penalties for "cocaine base"—particularly because such an exception could drive both dealers and users toward these other drugs.

The form of cocaine base known as "freebase" provides the same quick high to the user as does crack cocaine and has the same addictive qualities. In fact, it may be more addictive because it is typically purer than crack: "crack cocaine processors tend to be less careful when making crack cocaine" and "often cut the end product with adulterants to increase the weight and bulk of the crack rocks." *1995 Commission Report* 14 n.36. And "freebasing" poses additional dangers not present with crack cocaine, because if the user attempts to consume it before the ether has evaporated, the ether may "ignite or explode." *Id.* at 13. Petitioner himself acknowledges (Br. 19) that "freebase" is a form of "cocaine base" that "delivers the same high" as "crack."

While "freebasing" cocaine has largely been superseded by the use of "crack," some still use the freebase form of cocaine base today. *See, e.g., United States* v. *Gonzalez*, 608 F.3d 1001, 1003 (7th Cir. 2010), cert. denied, No. 10-7602, 2011 WL 55702 (Jan. 10, 2011); *id.* at 1005 (noting that "some drug users who want the faster, more intense high produced by cocaine base but don't want to buy street-quality crack are continuing to make and consume their own freebase"). And when Congress enacted the language at issue here, it could not know which particular form of cocaine base would become most prevalent in the future.

Coca paste also contains cocaine base, and it poses dangers similar to "crack." Congress was informed that just like "crack," when coca paste is smoked, it produces an "immediate, extreme euphoria," and a clinical study of its use revealed an "enormous compulsion to continue smoking coca paste until supplies were completely consumed." *Coca Paste and Freebase* 1-2. And just like crack, smoking coca paste poses severe health risks. *Id.* at 2 (noting the "fairly frequent appearance of psychotic reactions associated with chronic use [of coca paste] and the social and psychophysical deterioration"; smoking coca paste causes "abrupt and extreme mood shifts" as the user achieves an intense high that quickly ends); see *id.* at 2-3 (describing the effects of "smoking freebase, either in a special pipe or sprinkled on a cigarette" as "identical to smoking coca paste").

No evidence indicates that Congress intended to treat these two forms of cocaine base more leniently than "crack." "Crack," "freebase," and coca paste all contain cocaine base. In each substance, the cocaine base has the same chemical formula, same chemical structure, same physical properties, and same pharmacology. All three compounds can be smoked, thus allowing the drug to be absorbed into the bloodstream quickly and in large amounts—one of the key characteristics that prompted Congress to single out cocaine base in the first instance. And all three fit comfortably within the term "cocaine base."

4. Congress's intention to reach all forms of "cocaine base" is reinforced by another step Congress took in 1986. In the same bill that enacted the provision regarding "cocaine base," Congress passed the Controlled Substance Analogue Enforcement Act of 1986 (Analogue

Act), Pub. L. No. 99-570, Tit. I, Subtit. E, 100 Stat. 3207-14 (21 U.S.C. 802(32)(A), 813). The Analogue Act provides that substances that are chemically and pharmacologically similar to, but not identical to, listed controlled substances shall be treated as controlled substances. In particular, Congress provided that a "controlled substance analogue" shall be "treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813.

As with the CSA generally, the Analogue Act defines "controlled substance analogue" in chemical terms, because "[t]he effects of a drug are generally a function of its chemical structure." H.R. Rep. No. 848, 99th Cong., 2d Sess. Pt. 1, at 6 (1986) (*House Report*). Under the Analogue Act, a "controlled substance analogue" includes any substance whose chemical structure "is substantially similar to the chemical structure of a controlled substance in schedule I or II," and that either has a "similar * * * or greater" "stimulant, depressant, or hallucinogenic effect on the central nervous system," or is represented or intended to have such an effect. 21 U.S.C. 802(32)(A); see, *e.g.*, *United States* v. *Turcotte*, 405 F.3d 515, 521-523 (7th Cir. 2005), cert. denied, 546 U.S. 1089 (2006).

The stated purpose of the Analogue Act is "to prohibit persons who specifically set out to manufacture or to distribute drugs which are substantially similar to the most dangerous controlled substances from engaging in this activity." S. Rep. No. 196, 99th Cong., 1st Sess. 5 (1985) (*Senate Report*). The reports accompanying this Act explained that law enforcement officers found themselves one step behind underground chemists who would slightly alter the molecular structure of a controlled

substance to create a new drug with a substantially similar effect. *Id.* at 1-2; see *House Report* 4.[16] Thus, Congress decided to send the "message to illicit drug traffickers" that they could "no longer * * * remain immune from punishment" when they "purposefully deal[] in drugs that imitate the most dangerous compounds defined by law." *Senate Report* 6; see, *e.g.*, *United States* v. *Hodge*, 321 F.3d 429, 432-434 (3d Cir. 2003).

In light of Congress's evident concern for punishing trafficking in substances that are merely chemically and pharmacologically *similar* to listed controlled substances, it would be surprising if, in the very same bill, Congress crafted Clause (iii) *not* to reach substances like coca paste and freebase, which are chemically and pharmacologically *identical* to "crack" in every relevant sense.

D. Petitioner's Approach Creates Definitional Uncertainties And Practical Anomalies

Choosing street terms over the scientific nomenclature used to identify controlled substances in the CSA would create ambiguities and practical difficulties.

1. Congress's use of chemical terms allows for the straightforward identification of the substance at trial. In particular, when the plain scientific meaning of "cocaine base" is used, the substance can readily be shown to contain (or not to contain) cocaine base through stan-

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[16] The Act was necessary despite the Attorney General's ability to temporarily list a controlled substance analog under Schedule I, because that procedure was "entirely reactive and [could] only operate after [such analog had] already been shown to pose a severe risk to the public health," and because even after that process, "another minor alteration in [the drug's] structure beg[an] the entire process afresh." *Senate Report* 2.

dard chemical analysis. See, *e.g.*, *Easter*, 981 F.2d at 1558. For example, in petitioner's trial, a government chemist testified that she used three standard techniques of chemical analysis (infared spectroscopy, gas chromatography mass spectroscopy, and gas chromatography) to identify cocaine base in the substance at issue here. Gov't C.A. Supp. App. 334-335.[17]

Under petitioner's regime, in contrast, a substance may not be identifiable using chemical terms. Forensic chemists cannot distinguish between "crack" and other forms of "cocaine base" on a molecular level, because the controlled substance they contain—cocaine—has the same chemical formula and structure in either case. See, *e.g.*, *Easter*, 981 F.2d at 1558. Indeed, in this case petitioner asked that the jury be instructed that "[c]hemical analysis cannot establish a substance as crack because crack is chemically identical to other forms of cocaine base." C.A. App. 53-54.[18] It would be

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[17] The DEA informs this Office that in prosecutions for controlled botanical substances, forensic chemists identify the substances in part by their physical characteristics and in part by extracting the specific chemically active component from the plant and conducting subsequent chemical analysis. For example, marihuana is in practice identified in part by the extraction of tetrahydrocannabinols, see 21 U.S.C. 812(c) Sched. I(c)(17); peyote is in practice identified in part by the extraction of the chemical compound mescaline, see 21 U.S.C. 812(c) Sched. I(c)(11); and opium poppy and related substances (21 U.S.C. 812(c) Sched. II(a)(1) and (3)) are in practice identified in part by the extraction of morphine or other recognized opiate alkaloids, see 21 U.S.C. 802(19) (20).

[18] It is true that, if "crack" were defined as cocaine base prepared using certain reagents (such as baking soda), chemists could test for residual traces of those reagents. But the failure to find detectable amounts of those reagents does not mean those reagents were not used in producing "crack," because the reagent could have been fully con-

odd for Congress to have adopted an enhanced penalty provision for a substance that is not readily identifiable by scientific means.

2. Petitioner's proposal to limit "cocaine base" to "crack" poses more definitional questions than it answers. Although petitioner is emphatic that "cocaine base" must mean "crack," he does not advocate any particular definition of "crack" or explain how "crack" might be identified in a particular case. "Crack" is a street term that has no inherent plain meaning. It does not appear (in the drug-related sense) in common dictionaries.

In his brief to this Court, petitioner suggests a number of possible definitions of "crack." Sometimes he suggests that the key quality of crack is that it is "smokeable." Pet. Br. 8 (defining "crack" as "an easy-to-produce, smokeable substance containing cocaine that delivers large quantities of cocaine to the lungs") (internal quotation marks omitted); see also *id.* at 18, 20, 36. If that were true, then coca paste and "freebase" should also count as "crack," because they also are smokeable. See pp. 7-9, 30-31, *supra*.

On other occasions, petitioner identifies as the key feature of "crack" that it is made by cooking powder cocaine and baking soda. Pet. Br. 8 (crack is "formed by dissolving powder cocaine and baking soda in boiling water"). He also suggests that the absence of baking soda in his drug sample at trial meant it was not "crack." Br. 22 n.13. Yet elsewhere petitioner acknowledges (Br.

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sumed in the reaction. Nor would that approach serve Congress's objectives—which focused on the dangers of certain drugs, not particular methods of preparation. See p. 9, *supra* (noting that crack can be manufactured with other reagents, such as ammonia).

18) that "crack" can be made with "other weak bases" such as ammonia. See also, *e.g.*, *Gonzalez*, 608 F.3d at 1004.

At trial, petitioner advocated the Sentencing Guidelines' definition of "crack": "a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." C.A. App. 53-54; see Sentencing Guidelines § 2D1.1(c) (n.D). Petitioner does not expressly urge that definition now, perhaps because he did not contest at sentencing that the substance he sold met that definition. See p. 14, *supra*.

Petitioner's various suggestions thus raise a number of questions: Must the substance be smokeable to be "crack"? Must it have a certain effect when inhaled? Must it contain trace amounts of baking soda? Must it appear lumpy? Must it appear rock-like? These questions are easily avoided by using the plain scientific meaning of the term "cocaine base."

3. Those circuits that have accepted petitioner's argument that "cocaine base" should be judicially limited have struggled to describe that limitation in the absence of any statutory definition. Some courts have appeared to adopt the Sentencing Guidelines' definition of "crack," see *Edwards*, 397 F.3d at 574-577; *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377-378 (11th Cir. 1994). The definition of "cocaine base" in the Sentencing Guidelines, of course, does not control the interpretation of that term in the statute. See pp. 47-49, *infra*. In any event, the Guidelines' definition—which depends upon how the substance "usually" is prepared and "usually" appears—is hardly precise. Recognizing the imprecision in the Sentencing Guidelines' definition, the Seventh

Circuit has rejected the view that "crack" must be prepared using baking soda, as opposed to some other weak base. See *Gonzalez*, 608 F.3d at 1004. Indeed, in order to apply the Guidelines' definition, the Seventh Circuit has developed a nonexclusive, six-factor test for determining whether a substance is "crack."[19]

The D.C. Circuit has determined that "cocaine base" does not refer to all chemically basic forms of cocaine, but has not decided between two possible limitations on "cocaine base": either limiting it only to "crack" (a term the court did not define) or limiting it to "any cocaine that is smokable." *United States* v. *Brisbane*, 367 F.3d 910, 913, cert. denied, 543 U.S. 938 (2004). That analysis has likewise proven difficult; at least one defendant in that circuit has argued that his cocaine base was not "crack" because it contained too many impurities to be smoked. As a result, DEA chemists were required to assemble a device similar to a "crack pipe" that (using a vacuum) could "smoke" a drug sample in a laboratory setting.[20]

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[19] See *United States* v. *Bryant*, 557 F.3d 489, 499-500 (7th Cir. 2009) (asking "(1) whether the substance at issue has tested positive for the presence of cocaine base; (2) the color of the substance; (3) the shape and texture of the substance; (4) the method of packaging; (5) the price of the substance; and (6) whether the seller represents the substance as or understands the substance to be crack") (internal quotation marks, footnotes, and brackets omitted).

[20] See John F. Casale, *Assessment of the Volatility (Smokeability) of Cocaine Base Containing 50 Percent Mannitol: Is It a Smokeable Form of "Crack" Cocaine?* 3 Microgram J. 130, 131 (2005); 89-0322 (TFH) Mem. Op. 5-8 (D.D.C. Aug. 3, 2006) (relying on government chemists' laboratory "smoking" experiment to deny defendant's objections to sentence).

The Ninth Circuit also has suggested that "cocaine base" is limited to "cocaine that can be smoked," *United States* v. *Shaw*, 936 F.2d 412, 415-416 (1991), although in recent cases, it suggested the Guidelines' definition might apply, see, *e.g.*, *United States* v. *Hollis*, 490 F.3d 1149, 1156-1157 & n.4 (2007), cert. denied, 552 U.S. 1166 (2008). And the Sixth Circuit has held that "'cocaine base' as used in § 841 means 'crack cocaine'" without actually defining the term "crack cocaine." *United States* v. *Higgins*, 557 F.3d 381, 395 (2009).

These courts' struggle with crafting extra-textual judicial limitations on "cocaine base" highlights why Congress used straightforward chemical terms, rather than undefined street terms, in the CSA.

4. In addition to creating interpretative difficulties, petitioner's approach would create incentives for enterprising drug traffickers to develop new production methods for "cocaine base." In petitioner's view, whether a substance is "cocaine base" may depend on precisely how cocaine hydrochloride is converted to cocaine base. Pet. Br. 18, 22 n.13. Freezing the definition of "cocaine base" to one prevalent method of making the base would encourage innovative drug traffickers to produce a similar product using a different method. "[I]llicit manufacture of cocaine is not a static situation, but rather is constantly evolving," an evolution that is "forcibly accelerated" when successful enforcement initiatives require drug traffickers to "[e]xperiment[] with new procedures designed to evade [government] controls." Casale & Klein 98. As the D.C. Circuit has observed, "the development of crack itself demonstrates" that it is "hazardous to predict what this illicit 'industry' will come up with next"; "[i]t may be that tomorrow

someone will invent a method of preparing smokable cocaine to replace the 'baking soda method' used to prepare crack." *Brisbane*, 367 F.3d at 914.

In fact, such shifts in production methods are already underway. "More recently and increasingly * * * the traditionally separate, sequential paste and base operations are being condensed into direct leaf-to-base laboratories, skipping the isolation of coca paste." Casale & Klein 98. And most recently, "many operators now produce cocaine base in the form of 'crack cocaine' directly from coca leaf." John F. Casale et al., *Tropane Ethyl Esters in Illicit Cocaine: Isolation, Detection, and Determination of New Manufacturing By-Products from the Clandestine Purification of Crude Cocaine*, 53 J. Forensic Sci. 661, 661 (2008). It is unclear whether petitioner would regard such products as "crack." But unless one assumes that Congress intended Section 841(b)(1)(A)(iii)'s reference to "cocaine base" to become obsolete through the efforts of clever drug traffickers, there is every reason to treat such products as "cocaine base."

E. Petitioner's Other Arguments For Limiting "Cocaine Base" To "Crack" Lack Merit

Petitioner raises a host of other objections, none of which justifies imposing an extra-textual limitation on the term "cocaine base."

1. Giving "cocaine base" its accepted chemical meaning does not render the penalties for other cocaine-related substances superfluous

Petitioner contends that "interpreting 'cocaine base' as a purely chemical term renders much of [21 U.S.C. 841(b)(1)(A)(ii)] superfluous." Pet. Br. 39; see Pet. 22-25. He is mistaken.

During the time period relevant here, Section 841(b)(1)(A) provided for a minimum ten-year sentence for a defendant who distributed either five kilograms or more of a mixture or substance containing the cocaine-related substances in Clause (ii)—namely, "coca leaves," "cocaine, its salts, optical and geometric isomers, and salts of isomers," or "ecgonine, its derivatives, their salts, isomers, and salts of isomers," 21 U.S.C. 841(b)(1)(A)(ii)—or 50 grams or more of "a mixture or substance described in clause (ii) which contains cocaine base," 21 U.S.C. 841(b)(1)(A)(iii).

Clause (iii) defines a subset of materials in Clause (ii), because Clause (iii) applies only to "a mixture or substance" that is both "described in clause (ii)" and "contains cocaine base." 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii). Thus, "by enacting clause iii, Congress intended to single out a subset of cocaine-related substances, all forms of cocaine base, for harsher treatment." *United States* v. *Sloan*, 97 F.3d 1378, 1382 (11th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). Accordingly, Congress grafted Clause (iii) on to the preexisting statutory scheme in 1986. See 1986 Act, § 1002, 100 Stat. 3207-2; see also 21 U.S.C. 841(b)(1)(A) (Supp. II 1984).

Petitioner contends (Br. 38-39) that giving "cocaine base" its scientific meaning would "effectively encompass offenses involving every cocaine-related substance except powder and its chemical relatives." That is incorrect.

a. *Coca Leaves, etc.* Subclause (I) lists "coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed." 21 U.S.C. 841(b)(1)(A)(ii)(I). Petitioner asserts (Br. 15, 17, 27, 40)

that coca leaves contain "molecules of cocaine," and based on that assertion, he contends (*id.* at 40-41) that distribution of coca leaves could always be punished as distribution of "cocaine base" under Clause (iii). Petitioner is mistaken.

In fact, the sentence for an offense involving coca leaves could not be enhanced using Clause (iii). The scientific literature establishes that cocaine does not exist in the base form in coca leaves, but rather as a salt. Early chemists concluded that the fact that individuals who chew coca leaves to obtain a high "never chew[] coca alone" but instead "mix[] it with lime and ash, that is * * * with strong bases that isolate the cocaine" strongly suggests that "[c]oca contains the cocaine in the state of an inert salt." M. Bignon, *Note on the Properties of Coca and Cocaine*, 16 Pharm. J. & Transactions 265, 265-266 (1885). That conclusion is consistent with an early DEA analysis of coca leaves, in which scientists extracted cocaine-related substances from the leaves using an organic solvent so as to avoid significantly changing their chemical structures and concluded that "the total cocaine extracted is not present as the free base." Emanuel Solon & Albert Sperling, *Determination of Cocaine in Coca Leaves*, 17 Microgram 62, 62-63 (1984). More recently, scientists have analyzed dried coca leaves using electron microscopy and have concluded that "cocaine is present * * * in vivo, complexed with phenols"—meaning that cocaine exists in the leaves as a salt compound, not as cocaine base. Jorge F.S. Ferreira et al., *Histochemical and Immunocytochemical Localization of Tropane Alkaloids in* Erthroxylum Coca *var.* Coca *and* E. Novogranatense *var.* Novogranatense, 159 Int'l J. Plant Sci. 492, 493, 501 (1998).

Nor is there any evidence that Congress understood coca leaves to contain cocaine in its chemically basic form. Clause (iii) asks whether cocaine base is "contain[ed]" in a mixture or substance described in Clause (ii). We are unaware of any evidence presented to Congress regarding the particular molecular form of cocaine in coca leaves—*i.e.*, whether cocaine exists in the base form, the salt form, or some other form. For that reason, it is unlikely Congress intended coca leaves to be covered by Clause (iii).

Consistent with that conclusion, this Office is aware of no prosecution in which the government has sought, or a defendant has received, an enhanced sentence under 21 U.S.C. 841(b)(1)(A)(iii) or (B)(iii) for an offense involving coca leaves, or even any prosecution under Title 21 based on a defendant's possession, distribution, or importation of coca leaves. The DEA likewise was unable to identify any case in which it had been called upon to analyze coca leaves for purposes of a United States prosecution.

Indeed, whether coca leaves are punishable under Clause (iii) is an academic question. Coca leaves are rarely if ever imported into the United States for illicit purposes, because the volume of leaves that would be necessary to produce a significant amount of cocaine for illicit consumption would be enormous, and the risk of importing coca leaves in volume would make importation economically unfeasible.[21]

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[21] There is some importation of coca leaves for licit purposes. See *Turner* v. *United States*, 396 U.S. 398, 411 n.12 (1970); *S.B. Penick & Co.* v. *United States*, 14 Cust. Ct. 9, 11 (1944) (discussing the tariff treatment of "decocainized" or "spent" coca leaves, which are "useful * * * as a flavoring agent by manufacturers of the popularly known

Petitioner himself offers no scientific data establishing that cocaine occurs in coca leaves as distinct "cocaine molecules," and though his amici cite (Br. 2) several sources for the proposition that cocaine is "found in the coca plant," those sources likewise do not offer scientific evidence about the form of the cocaine in the leaves.[22] While cocaine may be *extracted* from coca leaves through chemical processing,[23] that does not mean cocaine base exists in that molecular form in the leaves. See also note 17, *supra* (DEA identifies controlled botanical substances in part by extracting chemically active components from them). Petitioner has identified no reason to believe that Congress thought otherwise. Accordingly, coca leaves should not be treated as containing "cocaine base" for purposes of Clause (iii).

b. *"Cocaine" etc.* Subclause (II) comprises "cocaine, its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. 841(b)(1)(A)(ii)(II). Although petitioner is correct that as a chemical matter, "cocaine" means "cocaine base," Br. 39, that does not mean the

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cola drinks"); see generally 21 U.S.C. 802(39), 814, 822-826 (governing legitimate use of controlled substances).

[22] One article upon which the government relies also refers generally to "cocaine free base in the leaves," Casale & Klein 99, but that article did not purport to represent a studied scientific conclusion about the molecular state of the cocaine-related substance in the leaves.

[23] Congress did carve out from the list in Subclause (I) "coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed"; this provision makes clear that the part of the leaves left over after cocaine and related substances have been extracted is not considered a controlled substance. But there is no reason to suppose that Congress, in enacting that language, had any knowledge of the form of the cocaine-related compounds in the leaf.

reference to "cocaine base" in Clause (iii) makes the reference to "cocaine" in Clause (ii) superfluous. Clause (iii) is defined as reaching a subset of Clause (ii), and "cocaine base" is a subset of "cocaine, its salts, optical and geometric isomers, and salts of isomers." Moreover, one could not remove the word "cocaine" from the statute as petitioner suggests, because the word "cocaine" is the antecedent for the rest of Subclause (II): "its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. 841(b)(1)(A)(ii)(II). Petitioner acknowledges (Br. 39), as he must, that Subclause (II) remains "meaningful" at least "with respect to * * * cocaine hydrochloride powder."[24]

2. ***The government's reading does not lead to absurd results***

Petitioner is likewise mistaken in contending that giving "cocaine base" its accepted chemical reading "leads to absurd results." Pet. Br. 41; see *id.* at 41-43.

Nearly all of petitioner's hypothetical "absurd results" revolve around coca leaves. See Pet. Br. 41-43. But as discussed above, pp. 42-44, *supra*, petitioner has not established that coca leaves "contain" cocaine base in the sense contemplated by the statute, the scientific literature suggests otherwise, and the government has never invoked the reduced quantity threshold in Clause (iii) under those circumstances.

Petitioner also suggests that it would be strange to apply higher minimum sentences "when [the] 'cocaine base' is dissolved in a liquid, is packed into fiberglass, or is melted into a flowerpot." Pet. Br. 43 (citations omit-

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[24] Subclause (III) covers ecgonine and its derivatives. Petitioner does not argue that Subclause (III) is made superfluous by Clause (iii).

ted). But there is nothing unusual about recognizing each of those trafficking methods for what they are: "a mixture * * * which contains cocaine base," 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii). The carrier medium in which a controlled substance is transported does not affect its classification under the CSA. Rather, under the approach taken in the 1986 Act, "the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." *Chapman* v. *United States*, 500 U.S. 453, 461 (1991). There is nothing anomalous about applying that approach to cocaine base. And to the extent that petitioner disagrees, his disagreement concerns when to include the weight of a drug carrier in determining the drug weight under Clause (iii), not which drugs are encompassed within Clause (iii) in the first place.

3. The Sentencing Guidelines' definition of "cocaine base" does not control that term's meaning in Section 841(b)(1)

Although petitioner notes (Br. 19, 21) the Sentencing Guidelines' definition of "cocaine base," he does not urge this Court to adopt that definition here. By its terms, the definition of the term "cocaine base" applies only "for the purposes of this guideline [§ 2D1.1]," and the Background Commentary repeats that limitation. Sentencing Guidelines § 2D1.1(c) (n.D). Read together, the Guideline definition and accompanying commentary demonstrate that the Commission intended its definition of the term "cocaine base" to be applied only to sentencing under the Guidelines. See *Neal* v. *United States*, 516 U.S. 284, 293 (1996) (observing that "it is doubtful that the Commission intended the constructive-weight method of the Guidelines to displace the actual-weight meth-

od that *Chapman* [v. *United States*, *supra*] requires" because the commentary "states that the new method is to be used 'for purposes of determining the base offense level'"). The Commission must be taken at its word. *Stinson* v. *United States*, 508 U.S. 36, 47 (1993).

But even if the Commission had intended its definition of the term to govern sentencing under Section 841(b)(1)(A)(iii), the revised Guideline nonetheless could not be given effect in that context. Congress has not delegated to the Commission the task of construing the term "cocaine base" in the sentencing statute. *Neal*, 516 U.S. at 290. Nothing in the 1986 Act suggests that Congress vested the Commission with the authority to interpret or to define the statutory phrase "cocaine base." Absent delegation of authority to an agency, sentencing statutes are construed and applied by the courts, using traditional tools of statutory construction. See, *e.g.*, *Deal* v. *United States*, 508 U.S. 129, 131-136 (1993); see also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts.").

The Commission's interpretation of the term "cocaine base" should not be given even persuasive weight in interpreting the statute. The definition was adopted with no accompanying analysis setting out the Commission's rationale for restricting "cocaine base" to "crack." Guidelines App. C, Amend. 487 (Nov. 1, 1993). Moreover, the Guidelines' definition has proven difficult to apply in the courts of appeals. See pp. 38-39, *supra* (noting Seventh Circuit's nonexclusive six-factor test).

Finally, Congress's failure to modify or disapprove the amendment adding this definition does not amount

to congressional approval of such a definition for *statutory* purposes. Congress had no reason to believe the Guidelines' definition would affect the calculation of mandatory minimum sentences under Section 841(b), and its failure to block that amendment cannot be viewed as congressional approval of such a change. This Court "[o]rdinarily * * * resist[s] reading congressional intent into congressional inaction," and this is not the exceptional case where Congress has "failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority." *Kimbrough*, 552 U.S. at 106. Moreover, unlike the amendment at issue in *Kimbrough*, which would have affected the great majority of sentencing proceedings in this area, Congress could reasonably have understood the Commission's definition as having relatively modest practical effect, given that the overwhelming majority of "cocaine base" cases in fact involve "crack."

Accordingly, the Sentencing Guidelines should not be read to determine the meaning of the statute, especially where the Commission's definition is out of step with Congress's consistent approach to identifying controlled substances in the CSA.

F. The Rule Of Lenity Has No Application In This Case

Contrary to petitioner's contention (Br. 44-46), the rule of lenity has no application here. The rule of lenity is applicable only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, * * * [the Court] can make no more than a guess as to what Congress intended," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations

omitted), and "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). A statute does not have a "grievous ambiguity" simply because courts have disagreed as to its meaning. *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Moreover, "[t]he mere possibility of articulating a narrow construction" is not sufficient to warrant application of the rule of lenity. *Smith* v. *United States*, 508 U.S. 223, 239 (1993).

Here, Congress used a specific chemical term—"cocaine base"—whose scientific meaning is plain. The word petitioner advances to limit that term—"crack"—appears nowhere in the relevant provision and nowhere in the CSA. Any "ambiguity" petitioner purports to identify arises not because the term "cocaine base" is susceptible to multiple meanings, but because petitioner wishes to use a set of interpretative principles—ones that look to street terms—that have no basis in the CSA. Moreover, the effect of using petitioner's proposed street term approach would be to create more, rather than less, uncertainty about the reach of the statute. It would also exempt from the Act's coverage substances that are chemically identical to, and every bit as dangerous as, "crack." Resorting to the rule of lenity is therefore unwarranted.[25]

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[25] If this Court were to disagree with the government's submission and hold that Section 841(b)(1)(A)(iii) is limited to the form of cocaine base known as "crack," it should remand this case for further proceedings. As the government explained in its brief in opposition to certiorari (Br. in Opp. 9-12), ample evidence shows that the form of cocaine base petitioner distributed would qualify as "crack," and petitioner did not dispute at sentencing that his drugs qualified as "crack" under the Sentencing Guidelines' definition.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 21 U.S.C. 802 provides in pertinent part:

Definitions

* * * * *

(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

* * * * *

(C) Such term does not include—

(i) a controlled substance

* * * * *

2. 21 U.S.C. 812 provides in pertinent part:

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

* * * * *

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended[1] pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

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[1] Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.[2]
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.

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[2] So in original. Probably should be "Alphacetylmethadol."

(25) Hydroxypethidine.

(26) Ketobemidone.

(27) Levomoramide.

(28) Levophenacylmorphan.

(29) Morpheridine.

(30) Noracymethadol.

(31) Norlevorphanol.

(32) Normethadone.

(33) Norpipanone.

(34) Phenadoxone.

(35) Phenampromide.

(36) Phenomorphan.

(37) Phenoperidine.

(38) Piritramide.

(39) Propheptazine.

(40) Properidine.

(41) Racemoramide.

(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.

(2) Acetyldihydrocodeine.

(3) Benzylmorphine.

(4) Codeine methylbromide.

(5) Codeine-N-Oxide.

(6) Cyprenorphine.

(7) Desomorphine.

(8) Dihydromorphine.

(9) Etorphine.

(10) Heroin.

(11) Hydromorphinol.

(12) Methyldesorphine.

(13) Methylhydromorphine.

(14) Morphine methylbromide.

(15) Morphine methylsulfonate.

(16) Morphine-N-Oxide.

(17) Myrophine.

(18) Nicocodeine.

(19) Nicomorphine.

(20) Normorphine.

(21) Pholcodine.

(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.

(2) 5-methoxy-3,4-methylenedioxy amphetamine.

(3) 3,4,5 trimethoxy amphetamine.

(4) Bufotenine.

(5) Diethyltryptamine.

(6) Dimethyltryptamine.

(7) 4-methyl-2,5-diamethoxyamphetamine.

(8) Ibogaine.

(9) Lysergic acid diethylamide.

(10) Marihuana.

(11) Mescaline.

(12) Peyote.

(13) N-ethyl-3-piperidyl benzilate.

(14) N-methyl-3-piperidyl benzilate.

(15) Psilocybin.

(16) Psilocyn.

(17) Tetrahydrocannabinols.

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) coca[3] leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.

(2) Anileridine.

(3) Bezitramide.

(4) Dihydrocodeine.

(5) Diphenoxylate.

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[3] So in original. Probably should be capitalized.

(6) Fentanyl.

(7) Isomethadone.

(8) Levomethorphan.

(9) Levorphanol.

(10) Metazocine.

(11) Methadone.

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane.

(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.

(14) Pethidine.

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.

(3) Glutethimide.

(4) Lysergic acid.

(5) Lysergic acid amide.

(6) Methyprylon.

(7) Phencyclidine.

(8) Sulfondiethylmethane.

(9) Sulfonethylmethane.

(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids.

SCHEDULE IV

(1) Barbital.

(2) Chloral betaine.

(3) Chloral hydrate.

(4) Ethchlorvynol.

(5) Ethinamate.

(6) Methohexital.

(7) Meprobamate.

(8) Methylphenobarbital.

(9) Paraldehyde.

(10) Petrichloral.

(11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

3. 21 U.S.C. 813 provides:

Treatment of controlled substance analogues

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

4. 21 U.S.C. 841 provides in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *

(C) In the case of a controlled substance in schedule I or II, * * * such person shall be sentenced to a term of imprisonment of not more than 20 years * * *

REPLY BRIEF

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In the Supreme Court of the United States

FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government tries mightily to portray this case as an easy exercise in statutory interpretation—"cocaine base" is a recognized scientific term; terms-of-art should be given their technical meaning; petitioner's reading of the statute is "extra-textual" (U.S. Br. 16, 22), and would cause confusion. But each step of the government's argument is wrong.

The conventional scientific term for substances with the chemical formula $C_{17}H_{21}NO_4$ is "cocaine," and Congress had already employed that term—with that meaning—in the Controlled Substances Act ("CSA") that Congress amended in 1986. The government's argument thus requires the Court to conclude that Congress intended two different terms—"cocaine" and "cocaine base"—to have an identical meaning. That of course is directly contrary to the settled principle that when Congress uses different terms it intends *different* meanings.

Moreover, it is the government's reading, not petitioner's, that would lead to bizarre results. *First*, it renders several parts of clause (ii) of § 841(b)(1)(A) entirely superfluous, because offenses involving substances specifically included in clause (ii)—such as "cocaine" and "coca leaves"—will always be subject to the higher mandatory minimum specified in clause (iii). Congress would have had no reason to list those substances in clause (ii) if it intended that in every case they would trigger clause (iii)'s penalty. *Second*, offenses involving unrefined, low potency coca leaves and paste would, under the government's interpretation, be subject to the especially severe mandatory minimum, but those involving cocaine hydrochloride

("cocaine powder"), long recognized as a dangerous drug, would not.

If Congress truly intended the government's interpretation, it could have written § 841(b)(1)(A) much more simply—with one clause imposing the severe minimum on offenses involving "cocaine," and another imposing the less severe minimum on those involving cocaine hydrochloride and cocaine isomers. The fact that Congress did not do that—but rather included *all* of these substances in clause (ii) and then made clause (iii)'s heightened penalty applicable to the subset of clause (ii) substances qualifying as "cocaine base"—makes clear that Congress did not intend to define the latter term by reference to any of the categories expressly listed in clause (ii); rather, it was using the new term "cocaine base" to delineate a new category of substances.

The statutory text, structure, and context make clear that the new category Congress intended to designate was crack cocaine. That conclusion is consistent with the use of the term "base" at the time the statute was enacted, as well as with the other terms Congress employed in the statute and with Congress's acknowledged purpose in enacting the provision. Moreover, it is an entirely workable standard that federal courts in every circuit have used—without the chaos curiously prophesized by the government—for over fifteen years in calculating Sentencing Guidelines ranges.

Finally, if the Court were to conclude that "cocaine base" is ambiguous—that neither the government's "chemical definition" approach nor petitioner's contention that "cocaine base" means crack cocaine provides a clear solution to the question—then it should apply the rule of lenity, and read the

term "cocaine base" narrowly to mean "crack cocaine."

A. The Statutory Language And Structure Establish That Congress Did Not Intend "Cocaine Base" To Be Interpreted As A Scientific Term.

The government's principal argument is that Congress employed "cocaine base" as a scientific term-of-art, whose "chemical definition" (U.S. Br. 16) encompasses all substances with the formula $C_{17}H_{21}NO_4$. See U.S. Br. 16-18, 20-21, 26. However, "context determines meaning * * * , and [this Court] 'do[es] not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'" *Johnson* v. *United States*, 130 S. Ct. 1265, 1270 (2010) (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)).

Here, the government's "chemical definition" approach is not supported by ordinary scientific usage; and it would mean that two terms in the CSA—"cocaine" and "cocaine base"—have precisely the same meaning, a result directly contrary to the long-established canon of construction that when Congress uses different terms in a statute it intends that they have different meanings. The government's approach also would "produce nonsense": it would raise serious questions about whether substances with the formula $C_{17}H_{21}NO_4$ are regulated by the CSA at all and it would subject offenses involving coca leaves to penalties one hundred times harsher than offenses involving cocaine hydrochloride ("cocaine powder"). The "chemical definition" argument should be rejected.

1. "Cocaine base" is *not* the term used by scientists to refer to substances with the chemical formula $C_{17}H_{21}NO_4$. The *Merck Index*, which the government recognizes as the critical authority in this area (see U.S. Br. 5-6), identifies the substances with this chemical formula as "cocaine." See *The Merck Index: An Encyclopedia of Chemicals, Drugs, and Biologicals* #2455, at 412 (14th ed. 2006) ("*Merck Index*").

Indeed, "cocaine base" does not appear in entry #2455—or, to our knowledge, anywhere else in the *Merck Index*.[1] The *Index* furnishes seven alternate chemical names for cocaine, but "cocaine base" is not one of them.[2]

That is because "cocaine," and not "cocaine base," is the overwhelmingly predominant technical term-of-art used in dictionaries, scientific textbooks, and chemical indices to describe substances composed of the molecule $C_{17}H_{21}NO_4$. This was true at the time Congress utilized the term "cocaine base" in 1986,[3] and it has remained true ever since.[4]

---

[1] The government's brief employs a sleight-of-hand, using the term "cocaine base" while referencing and relying upon the *Merck Index* entry for "cocaine." *E.g.*, U.S. Br. 6, 20.

[2] See *The Merck Index: An Encyclopedia of Chemicals, Drugs, & Biologicals* 2411, at 348 (10th ed. 1983). This edition (current in 1986) contains separate entries with chemical formulae and data for "Cocaine" (#2411), "Cocaine Hydrochloride" (#2412), "Cocaine Nitrate" (#2413), and "Cocaine Sulfate" (#2414), but no entry for "Cocaine Base."

[3] See, *e.g.*, Stanley H. Pine et. al., *Organic Chemistry* 52 (4th ed. 1980); *Rodd's Chemistry of Carbon Compounds* 298 (1980); Daniel S. Kemp & Frank Vellaccio, *Organic Chemistry* 872, 1268 (1980); *Miall's Dictionary of Chemistry* 117 (B.W.A. Sharp ed., 5th ed. 1981); *American Drug Index* 146 (N. Billups & S. Billups eds., 26th ed. 1982); T.W. Graham Solomons, *Organic*

2. Congress used the conventional scientific term "cocaine"—not "cocaine base"—throughout the rest of the CSA to refer to the category of substances with the chemical formula $C_{17}H_{21}NO_4$. The fact that Congress used the conventional term to identify this set of substances is a very strong indication it did not intend a different term, "cocaine base," to have the very same meaning.

The version of the CSA that Congress amended in 1986 already included the term "cocaine"—in the definition of "narcotic drug" (the category of substances subject to criminal penalties), and in the

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Chemistry 889 (3d ed. 1984); *Concise Chemical and Technical Dictionary* 322 (H. Bennett ed., 4th ed. 1986). For earlier sources, see also, *e.g.*, *Hackh's Chemical Dictionary* 210 (J. Grant ed., 3d ed. 1953); *Dictionary of Organic Compounds* 720 (4th ed. 1965); *Stedman's Medical Dictionary* 292 (23d ed. 1976). These sources make objectively clear that "cocaine" is used in its strict technical sense to mean $C_{17}H_{21}NO_4$ only. Even non-technical dictionaries took pains to use "cocaine" precisely. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 434 (P. Gove ed., 1981) ("1: a bitter crystalline alkaloid $C_{17}H_{21}NO_4$ obtained from coca leaves * * * .").

[4] See, *e.g.*, *Grant & Hackh's Chemical Dictionary* 142 (R. Grant & C. Grant eds., 5th ed. 1987); *CRC Handbook of Chemistry and Physics* C-213 (R. Weast et al. eds., 68th ed. 1987); *Basic and Clinical Pharmacology* 354 (B. Katzung ed., 3d ed. 1987); *Chambers Science and Technology Dictionary*, 171 (1988); *Concise Encyclopedia: Biochemistry* 119 (T. Scott & M. Eagleson eds., 2d ed. 1988); *McGraw-Hill Dictionary of Scientific and Technical Terms* 374 (4th ed. 1989); *The Merck Index* #2450, at 383 (11th ed. 1989); G. Sackheim & D. Lehman, *Chemistry for the Health Sciences* 343 (6th ed. 1990); *Concise Encyclopedia: Biochemistry and Molecular Biology* 126 (3d ed. 1997); *Encyclopedia of Toxicology* 355 (1998); *American Drug Index* 201 (51st ed. 2006); *USP Dictionary of USAN and International Drug Names* 221 (2007).

Act's list of controlled substances in Schedule II. See Pet. Br. 6-7 (citing 21 U.S.C. §§ 802(17), 812(c)). As the government recognizes (U.S. Br. 24-27), the terms used in that definition and in the Act's schedules are scientific terms that have been given their scientific meanings. Thus, "cocaine" in the CSA means the category of substances with the chemical formula $C_{17}H_{21}NO_4$. See Pet. Br. 6.

Confronted with the reality that its interpretation of "cocaine base" is synonymous with the well settled scientific definition of "cocaine," the government remarks that these two terms are "somewhat redundant." U.S. Br. 21. Not so. Under the government's approach, these two terms are *entirely* redundant. Nothing that is "cocaine base" is not "cocaine." Nothing that is "cocaine" is not "cocaine base."

The government's argument thus ignores the cardinal rule of statutory interpretation that "the use of different words is purposeful and evinces an intention to convey a different meaning." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 2003 (2010).

The government imagines that "Congress reasonably decided to add the word 'base' to clarify that it was referring to the chemically basic form of cocaine, as opposed to the salt form of the drug that might colloquially be referred to as 'cocaine.'" U.S. Br. 21. But there is no support in the statutory language or structure for this speculation—especially in light of the clear meaning of "cocaine" in the pre-1986 CSA, and the text of the pre-1986 Act and of clause (ii) itself, both of which explicitly distinguish between "cocaine" and "its salts." The government simply cannot avoid the fact that its approach conflicts with the fundamental principle that when Congress uses two different terms in a statute, those

terms must be accorded different meanings. For that reason alone, its "scientific" approach must be rejected.

3. The government similarly is unable to provide a credible response to the fact that its "chemical definition" approach would swallow and render superfluous the term "cocaine" as used in clause (ii)(II), which subjects to a lower mandatory minimum penalty the possession of "cocaine, its salts, optical and geometric isomers, and salts of isomers." See Pet. Br. 39-40.

Here, the government pleads for a grammatical indulgence, contending that the term "cocaine" in clause (ii)(II) functions only as a makeweight "antecedent" for the terms "its salts" and "optical and geometric isomers." U.S. Br. 46. But Congress did not write "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers." The government's argument asks the Court to ignore the plain words Congress used.

To be sure, when Congress added the new penalty provision for "cocaine base" in clause (iii), it could have changed the wording "cocaine, its salts" in clause (ii)(II) to the term "cocaine salts." The fact that it did not do so is not evidence of an oversight, as the government would have it, but rather evidence that "cocaine base" has a meaning different from—and more limited than—"cocaine."

Indeed, the government's willingness to deprive the term "cocaine" in clause (ii)(II) of an independent meaning, if endorsed by this Court, could have significant unintended effects on the regulation of cocaine as a controlled substance. The phrase used in clause (ii)(II)—"cocaine, its salts, optical and geomet-

ric isomers, and salts of isomers"—also appears in the provisions classifying cocaine as a narcotic drug and as a substance that qualifies for listing on the controlled substance schedules. See 21 U.S.C. §§ 802(17)(D), 812(c)(II)(a)(4). If the government is correct that "cocaine, its salts" means only "cocaine salts" in clause (ii)(II), then how could the same phrase have a different meaning in these other parts of the statute? But extending the government's novel interpretation of clause (ii)(II) to the very same phrase in these provisions would create substantial doubt about the status of "cocaine" as a category of substances regulated under the CSA, because failing to accord independent meaning to the word "cocaine" (as the government claims is appropriate) would restrict the scope of the statute to "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers."

The only plausible conclusion is that the government is wrong; the word "cocaine" in clause (ii)(II) must have independent content. And that means that, under the government's interpretation, all substances qualifying chemically as "cocaine base" are encompassed within clause (iii) as well as within clause (ii) and, accordingly, "[clause] (iii) swallows [clause] (ii)." *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007). That bizarre outcome provides yet another reason why the government's "chemical definition" should be rejected.

4. Neither does the government have any persuasive response to our argument, Pet. Br. 40-41, that its broad construction of "cocaine base" would mean that an offense involving only coca leaves would trigger the extremely severe mandatory minimum penalties for "cocaine base" offenses.

The government says that coca leaves do not contain "cocaine," and that its strictly scientific interpretation of the term "cocaine base" therefore could not possibly encompass coca leaves. That claim would have come as quite a surprise to Congress. When subjecting coca leaves to a mandatory minimum penalty in clause (ii)(I), Congress specified that the penalty would not apply to "coca leaves and extracts of coca leaves *from which cocaine*, ecgonine, and derivatives of ecgonine *or their salts have been removed*." 21 U.S.C. § 841(b)(1)(A)(ii)(I) (emphasis added). Congress thus plainly understood coca leaves to contain at least some cocaine (in addition to any salts of cocaine also in coca leaves). Only by once again excising or eviscerating the term "cocaine" can the government's interpretation succeed.

The government's argument is not just bad statutory interpretation—it is bad science as well.

To begin with, the government overlooks the fact that one of its own sources reports an extraction from coca leaves of cocaine (in base form, not as a salt).[5]

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[5] Jorge F.S. Ferreira et al., *Histochemical and Immunocytochemical Localization of Tropane Alkaloids in* Erythroxylum Coca, 159 Int'l J. Plant Sci. 492 (1998). The study reported that dipping fresh young leaves in chloroform for 80 seconds "resulted in up to 75.5% of their cocaine extracted." *Id.* at 498. Ignoring this part of the article, the government cites another portion for the strained proposition that cocaine in coca leaves exists in "complex" with phenols—and that this means that all cocaine produced in the leaf has undergone a chemical reaction with phenol to form a salt. See U.S. Br. 43. But a closer reading makes clear that at best *some* cocaine in coca leaves is in "complex" with phenols. See *id.* at 501 ("[D]ata indicate that the alkaloids [like cocaine] *might* be naturally complexed with the phenols" and that additional reactions "result[] in *further* com-

More advanced methods of detection that do not rely on extraction-by-solvent have reached the same conclusions.[6]

As a general matter, scientific literature refers to cocaine as an alkaloid, which is defined as a "nitrogen-containing *base[]* that *occur[s] naturally in plants*." G. Marc Loudon, *Organic Chemistry* 1108 (4th ed. 2002) (emphasis added); see also U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (1995) ("Cocaine is a naturally occurring substance derived from the leaves of erythroxylon plants indigenous to South America."); Physicians & Scientists Amicus Br. 2, 5.

Finally, the Court can draw scarce comfort from the government's reliance on a 125-year-old scientific report. U.S. Br. 43.[7] Observing that coca users chew

plexing.") (emphasis added). Cocaine as a base, of course, could not be "further[ed]" in any direction if it does not initially exist.

The other article cited by the government describes the results from using chloroform as a solvent to extract the chemical from coca leaves, stating that "the total cocaine extracted is not present as the free base * * *." U.S. Br. 43. While the article cited concludes that the leaf content as a *whole* is not basic, that hardly means *none* of the leaf content is basic. See Laurent Rivier, *Analysis of Alkaloids in Leaves of Cultivated* Erythroxylum *and Characterization of Alkaline Substances Used During Coca Chewing*, 3 J. Ethnopharmacology 313, 322-323 (1981) (using chloroform and hexane to extract cocaine).

[6] See R.G. Cooks et al., *Mass-Analyzed Ion Kinetic Energy (MIKE) Spectrometry and the Direct Analysis of Coca*, 3 J. Ethnopharmacology 299, 303 (1981) (using a new technique with "the ability to identify individual components of very complex mixtures at very high sensitivities and without any prior chemical pretreatment [or] extraction" and finding that "cocaine * * * was readily identified" in a sample of ground coca leaves).

[7] See M. Bignon, *Note on the Properties of Coca and Cocaine*, 16 Pharm. J. & Transactions 265 (1885).

the leaves mixed with bases, this source suggests that they do so to convert to cocaine any salts of cocaine that are within the leaf. From this the government erroneously infers that coca leaves must contain *only* salts of cocaine. It fails to recognize that the same behavior could be equally explained by the fact that a leaf could contain *both* cocaine and its salts, such that chewing the leaf with lime or another base compound would enhance its narcotic effect. See, *e.g.*, Rivier, *supra*, at 328, 333.

In short, there is no merit to the government's claim that coca leaves do not contain "cocaine" (and hence would not meet the government's definition of containing "cocaine base"). The government's argument neither squares with Congress's understanding nor with the scientific consensus confirming the presence of cocaine—not just its salts—in coca leaves.

Coca leaves, of course, contain cocaine in its least potent form. See Sidney Cohen, 2 *The Substance Abuse Problems: New Issues for the 1980s* xiii (1985) ("The alkaloid, cocaine, is more than a hundred times more powerful than the coca leaves from which it comes."). Applying clause (iii)'s mandatory minimum to offenses involving coca leaves would have the irrational result of subjecting offenses involving leaves to harsher penalties than offenses involving cocaine hydrochloride ("cocaine powder"), one of the most dangerous drugs.

The government asserts that it has never sought a sentence enhancement for coca leaves under clause (iii). U.S. Br. 44. But the question is what Congress intended, and the government's reading of "cocaine base" requires the conclusion that Congress intended for clause (iii) to reach offenses involving coca leaves.

That contention simply is not credible. Here, as in *Johnson*, the government is attempting to force a technical definition where it "plainly do[es] not fit and produce[s] nonsense." 130 S. Ct. at 1270. Cf. *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010) (rejecting the government's "promise[] to use [a statute] responsibly").

5. The government's "chemical definition" approach is also sharply inconsistent with the statutory structure. It would create two distinct, non-overlapping categories: mixtures or substances containing cocaine, all of which would be subject to clause (iii)'s heightened mandatory minimum; and mixtures or substances containing "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers"—such as cocaine powder—which would be subject to clause (ii)'s less severe mandatory minimum. If Congress had intended such a result, however, it could have achieved it far more simply: clause (ii) could have set out lower penalties for any "detectable amount" of "cocaine salts" (or isomers), while clause (iii) could have set higher penalties for any "detectable amount" of "cocaine."

But that is not what Congress did. The statute expressly creates overlapping categories: clause (ii) imposes a less severe minimum on a broad set of substances, while clause (iii) sets out a heightened penalty for a subset of the substances described in clause (ii) that qualify as "cocaine base." Congress's choice of this structure provides additional evidence that it did not intend to adopt the "chemical definition" urged by the government.

Moreover, the government's reading lumps crack cocaine together with a wide range of substances that do not conceivably present the same degree of

menace to society– coca leaves, cocaine-laced flowerpots, and cocaine-packed fiberglass. See Pet. Br. 43 (citing examples). Most of these substances cannot even be used by a drug consumer without much further processing. *Ibid.* At the same time, the government's construction exempts from the heightened mandatory minimum offenses using cocaine hydrochloride ("powder"), which has long been recognized as a dangerous drug.

These distinctions simply make no sense. Leaves and other non-usable forms of cocaine are not, as the government asserts, "reasonably comparable evils" within the unstated-but-presumed intent of Congress. U.S. Br. 28. And, as Judge Posner observed in rejecting the government's approach, "no reason has ever been suggested why Congress would have wanted crimes involving unprocessed cocaine to be punished more heavily than crimes involving cocaine hydrochloride." *United States* v. *Gonzalez*, 608 F.3d 1001, 1003 (7th Cir. 2010).

B. The Text, Structure, And Context Of The Provision Demonstrate That "Cocaine Base" Means Crack Cocaine.

We explained in our opening brief (at 28-30) that the text and structure of § 841(b)(1)(A)—in particular, the 100-to-1 disparity between the mandatory minimum trigger amounts in clause (ii) and clause (iii)—show that Congress intended the term "cocaine base" to focus on an especially dangerous subset of the range of substances described in clause (ii).

The government concedes that "the Congress that enacted the 1986 Act was prompted to act by a concern about 'crack'." U.S. Br. 28. Indeed, this Court has recognized that "[d]rug abuse in general, and

crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions." *Kimbrough* v. *United States*, 552 U.S. 87, 95 (2007) (quoting U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 121 (1997)); Pet. Br. 8-9.

In 1986, when this problem came to Congress's attention, there was no generally recognized formal term describing the substance Congress wished to target (crack, which has the same chemical composition as other forms of cocaine). Congress therefore selected one of the less colloquial sounding terms then in public use—"cocaine base"—for inclusion within the statute. See Pet. Br. 31-34.

The government attacks this conclusion on a variety of grounds; none is persuasive.

1. The government protests that "[i]f Congress had wanted to limit the sentencing provision to 'crack,' it easily could have said so." U.S. Br. 15-16. But two sentences later it explains why Congress did not use the word "crack" in the CSA: "The CSA * * * does not use street names." *Id.* at 16. Congress decided to target a particularly virulent type of cocaine, then commonly referred to by a number of "street" terms, including "crack," for drastically heightened penalties. Congress reasonably chose not to use the quite informal term "crack" in the statute, but instead to use a more formal-sounding term—"cocaine base."

2. The government warns that construing "cocaine base" to include only crack cocaine will encourage "enterprising" and "clever" drug traffickers who will fashion crack-like substances. U.S. Br. 40, 41. But these concerns overlook the settled crack cocaine

definition already applied by the courts to thwart such efforts (see pp. 18-20, *infra*) and the fact that such drug traffickers will still remain subject in any event to criminal penalties for dealing other non-crack forms of cocaine.

In addition, the government's proposed definition is subject to the same criticism. Crack-like substances made from optical and geometric isomers of cocaine would not qualify as "cocaine base" under the government's "chemical definition" approach. See Pet. Br. 6-7 & n.3.

The government similarly relies on the Analogue Act—a law adapting the CSA's regulatory scheme to newly created alternative substances—to suggest that Congress intended its definition of "cocaine base" to sweep broadly. Br. 33-34. This is groundless misdirection. The purpose of the Analogue Act was to allow prosecution of crimes involving substances that do *not* appear on the drug schedules but that have substantial similarities to controlled substances. See, e.g., *United States* v. *Hodge*, 321 F.3d 429, 437 (3d Cir. 2003). The Act does not bear on the question of which *already illegal* cocaine-related substances should be subject to the harshest of penalties reserved for crack cocaine.

3. The government also complains that interpreting "cocaine base" to mean only crack cocaine would exclude other smokeable forms of cocaine such as freebase and coca paste. U.S. Br. 31-33.

At the time Congress acted, however, it understood that—in contrast to the huge threat posed by crack cocaine—concerns regarding coca paste and freebase were virtually nonexistent. In the handful of times the words "coca paste" appeared in the 1986

hearings, it was used to refer to the "intermediate product in producing the hydrochloride salt," not to a drug distributed in American cities. *"Crack" Cocaine, Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 87 (1986) (statement of Dr. Robert Byck, M.D.). And Congress understood freebase largely to be a drug created by individual users for private consumption after purchasing *cocaine hydrochloride* from a dealer, not a substance that was itself widely distributed on the streets. The danger, complexity, and expense of manufacturing freebase render it not amenable to large-scale production and distribution. See, *e.g.*, *id.* at 2, 71.

Congress opted not to impose the harshest of penalties on forms of cocaine that were far less commonly marketed and prevalent in the United States (both coca paste and freebase), far more subject to self-regulation by virtue of the notorious dangers of their manufacture (freebase), and far less potent when smoked (coca paste).

Congress's decision not to include some non-crack forms of smokeable cocaine is no different that its determination not to impose the harsher mandatory minimum on offenses involving other forms of cocaine-related substances that are indisputably *not* "cocaine base." Congress, for example, did not single out crimes involving injectable forms of cocaine salts for a harsher penalty. As the government concedes, *both* injected cocaine hydrochloride and crack "reach[] the brain most quickly," with "short lasting effects" leading to more dosages and that create the greatest danger of addiction. U.S. Br. 10. A statutory scheme that aimed broadly at all sub-

stances similar to crack would surely provide for increased penalties for injectable cocaine as well.

To be sure, the government could argue that drug users are more likely to smoke crack than to inject cocaine hydrochloride—and that Congress could reasonably have decided to exclude that substance because the threat to society was not as acute as that posed by the more "user-friendly" crack cocaine. But precisely the same is true of the disincentive to risk self-immolation like Richard Pryor by home-brewing freebase cocaine. No sensible reason explains why Congress would subject freebase cocaine to a harsher penalty than injectable cocaine hydrochloride, which is precisely what the government's overbroad interpretation of "cocaine base" would require.

In addition, Congress chose a lower quantity trigger for crack cocaine because it was aware that crack dealers sold their wares in much smaller quantities than cocaine powder dealers. That is, Congress singled out crack because of the way it was sold, not only because of the way it made users feel.

Immediately prior to the Act's passage, the DEA reported that "[c]rack is sold almost exclusively by * * * retail dealers" in quantities that "infrequently exceed one ounce [28.3 grams]," whereas cocaine powder dealers make "multi-kilogram quantities of cocaine hydrochloride available." U.S. DEA, *Special Report: The Crack Situation in the United States* 2 (1986). Thus was born the 100-to-1 ratio (28.3 grams is approximately 1/100th of 3 kilograms). Congress narrowly tailored clause (iii)'s quantity trigger to reflect the quantities in which *specifically crack cocaine* was being trafficked on the streets. See *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 4-5 (1997) ("To determine the quantity of

drugs indicative of mid-level or serious traffickers, Congress consulted with drug enforcement experts to gather information about drug markets at the time [1986] and set quantity triggers based on this information."); see also H.R. Rep. No. 99-845, 11-12 (1986).

In sum, construing "cocaine base" to mean crack cocaine is the only interpretation that is consistent with the statutory text, structure, and context.

C. The Cases Interpreting The Sentencing Guidelines' Definition of Crack Cocaine Provide A Clear Standard For "Cocaine Base."

The government contends (U.S. Br. 37-38) that interpreting "cocaine base" to mean crack cocaine will create tremendous uncertainty. But the cases interpreting the relevant Sentencing Guidelines provision provide a fully fleshed-out definition— a definition that the government itself has defended as clear in other contexts.

1. The Sentencing Guidelines define crack cocaine as "a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rock like form." U.S.S.G. § 2D1.1(c) (n.D). *All* district courts nationwide have been applying the Guidelines definition of crack cocaine to calculate a defendant's applicable sentencing range once statutory minimums are met.[8]

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[8] Sentencing judges must calculate the applicable Guidelines range before determining a precise sentence. *United States* v. *Booker*, 543 U.S. 220, 259 (2005). Because the applicable range is dependent upon whether the offense involved crack cocaine,

The government protests that crack cocaine has "no inherent plain meaning" (U.S. Br. 37) and that the Guidelines definition of crack is "hardly precise" (U.S. Br. 38). But this complaint is belied by 17 years of judicial experience. The Second Circuit, for example, concluded that "[t]he Guidelines definition is * * * lucid enough for lawyers, dealers, users and citizens." *United States* v. *Canales*, 91 F.3d 363, 368 (2d Cir. 1996).

Indeed, when fending off challenges by criminal defendants to the Guidelines definition of crack cocaine, the government has been quick to argue that the Guidelines definition is plainly understandable and perfectly workable. See, *e.g.*, Brief for the United States at 36, *United States* v. *Leonard*, 116 F.3d 492 (11th Cir. 1997) (No. 96-4017) ("[N]either law enforcement, the courts, nor drug distributors * * * have had any difficultly making the distinction between 'crack' and other forms of cocaine and cocaine base."); Brief for the United States at 32, *United States* v. *Canales*, *supra* (analogizing ability to distinguish between crack and freebase to an ordinary person's ability to distinguish between "water and ice").

What is more, the government has argued that "[b]y restricting the definition of 'cocaine base' to crack, the Guidelines * * * have made it easier for ordinary citizens and police officers to understand

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courts must determine whether the substance was crack for Guidelines calculation purposes. Thus, even courts in circuits that have adopted the government's construction of "cocaine base" must determine whether a substance is crack. See, *e.g.*, *United States* v. *Waters*, 313 F.3d 151 (3d Cir. 2002); *United States* v. *Diaz*, 176 F.3d 52, 119 (2d Cir. 1999); *United States* v. *Brooks*, 161 F.3d 1240, 1248 (10th Cir. 1998).

what conduct the statute addresses," and therefore that "the Guidelines have added clarity, not ambiguity, to prosecutions involving crack." Brief for the United States at 28, *United States* v. *Miller*, 89 F.3d 853 (11th Cir. 1996) (No. 94-5013).[9] The government's new-found arguments to the contrary ring hollow in light of these prior statements.

2. The government's concerns that prosecutors will have to take elaborate measures to show a substance is crack or that defendants will escape higher sentences through loopholes have failed to materialize in the lower courts' application of the Guidelines definition. Courts have been flexible in construing crack to include substances prepared with agents other than sodium bicarbonate (baking soda); "enterprising" drug dealers have not escaped heightened crack penalties simply by using other reactants.[10]

The government's reference to a case in which "DEA chemists were required to assemble a device similar to a 'crack pipe' that * * * could 'smoke' a drug sample in a laboratory setting" (U.S. Br. 39) is wholly inapposite. The issue there did *not* concern whether or not the substance involved was crack cocaine. Rather, the defendant contended that his sentence should be modified in light of an applicable Guidelines amendment pertaining to how substances are weighed. *United States* v. *Byfield*, No. 89-0322

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[9] See also Brief for the United States at 35, *United States* v. *Leonard*, *supra* (arguing that the Guidelines definition "adds clarity, not the relative obfuscation that limiting the definition to a chemical one * * * would entail").

[10] See, *e.g.*, *United States* v. *Eli*, 379 F.3d 1016 (D.C. Cir. 2004); *Waters*, *supra*, at 155; *Diaz*, *supra*, at 119; *Brooks*, *supra*, at 1248.

(TFH), 2006 WL 2228936, at *1 (D.D.C. Aug. 3, 2006). The DEA's "crack pipe" experiment—which was in no sense "required"—served to bolster the prosecution's claim that the substance was "usable" in the form in which it was found and that its entire weight should therefore be counted.

The government omits from its discussion any mention of a case decided by the D.C. Circuit stating precisely that the prosecution does *not* have to stage any sort of "smoking" display to demonstrate that the defendant is subject to clause (iii)'s higher mandatory minimum for offenses involving "cocaine base." *Eli*, *supra*, at 1022 ("Although [the defendant] rejects [the Government's] testimony on the ground that the chemist did not attempt to smoke the substance himself, we can hardly insist that a government chemist smoke a drug sample in order to certify its identity.").

In sum, the well-established jurisprudence developed under the Guidelines defining the term "crack cocaine" precludes any possibility that interpreting clause (iii) to encompass crack cocaine will create uncertainty in the lower courts.

D. The Court Should Apply The Rule of Lenity.

If the Court finds that the statute is ambiguous—that the government's reading of "cocaine base" is inconsistent with science and logic, but that petitioner's reading is not sufficiently persuasive—then the Court should apply the rule of lenity to limit "cocaine base" to mean only crack cocaine.

"[B]ecause of the seriousness of criminal penalties * * * legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S.

336, 348 (1971). The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.) (citing *Bass*). "This venerable rule * * * places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Ibid.* If Congress intended "cocaine base" to have the broad meaning advocated by the government, then "Congress can make that meaning clear." *Holloway* v. *United States*, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)).

"It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Holloway*, 526 U.S. at 21 (quoting *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). In keeping with this presupposition, this Court should adopt petitioner's reading of 21 U.S.C. § 841(b)(1)(A), and leave "Congress * * * to enact the words that will produce the result the Government seeks." *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF INDIVIDUAL PHYSICIANS AND SCIENTISTS ROBERT BOOTH, PhD, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scientists and physicians who have written, taught and consulted about medical and public health issues relating to controlled substances.[2] All but one are university professors. *Amici* have spent their careers studying, writing about, and promoting a better understanding of, controlled substances including cocaine. They are in a unique position to assist the Court in understanding the chemical definitions of the substances covered by 21 U.S.C. §841.

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[1] Respondent and Petitioner have consented to the appearance of *amici curiae* in this matter; their letters of consent are submitted with this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel and *amici* are the sole authors of this brief, and that no person or entity other than counsel and *amici* contributed monetary support to this brief's preparation and submission.

[2] *Amici curiae* are, in alphabetical order, Robert Booth, PhD, Professor, Department of Psychiatry, University of Colorado School of Medicine; R. Douglas Bruce, MD, MSc, MA, Assistant Professor of Medicine (AIDS) and of Epidemiology (Microbial Diseases), Yale School of Medicine; Robert Heimer, MSc, PhD, Professor of Epidemiology and Associate Professor of Pharmacology, Yale University School of Public Health; Richard Schottenfeld, MD, Professor of Psychiatry, Yale School of Medicine and Yale School of Public Health; Jay Siegel, MSc, PhD, Professor and Chair of the Department of Chemistry and Chemical Biology, Indiana University-Purdue University Indianapolis; and Sharon Stancliff, MD, Medical Director of the Harm Reduction Coalition.

SUMMARY OF THE ARGUMENT

This brief is offered to make a few (hopefully simple) points about the chemical definitions of the substances covered by 21 U.S.C. §841.

Cocaine is an alkaloid found in the coca plant, primarily in the variety *Erythroxylon coca*. Richard Ashley, *Cocaine, Its History, Uses and Effects* 13 (St. Martin's Press, 1975); Dominic Streatfield, *Cocaine, An Unauthorized Biography* 2 (Virgin Publ. Ltd., 2001); Roger D. Weiss, MD, Steven M. Mirin, MD and Roxanne L. Bartel, MD, *Cocaine* 5 (American Psychiatric Press, 2d ed. 1994). Alkaloids are commonly defined as basic chemical compounds that contain nitrogen and occur naturally in a large variety of organisms, including plants. Ashley, *supra,* at 18; G. Marc Loudon, *Organic Chemistry* 1108 (Oxford Univ. Press, 2002); T.W. Graham Solomons and Craig B. Fryhle, *Organic Chemistry* 994 (John Wiley & Sons, Inc., 8th ed. 2004); *see, United States v. Brisbane*, 367 F.3d 910, 911 (D.C. Cir. 2004) ("Cocaine is a naturally occurring alkaloid – that is, a base."). Most alkaloids have pronounced physiological effects when administered to animal organisms; and many have psychotropic effects as well. Ashley, *supra,* at 18; Solomons and Fryhle, *supra,* at 994.

Basic compounds (bases), such as alkaloids, are defined by the established and widely used Lewis Acid and Base Theory as: substances comprised of molecules each of which can *donate* an electron pair to another molecule. Solomons and Fryhle, *supra,* at

99. The chemical formula for cocaine is $C_{17}H_{21}NO_4$; the nitrogen atom (N) has an electron pair that it can donate. Loudon, *supra,* at 1108. The ability to donate an electron pair to another molecule is what makes cocaine a base. Solomon and Fryhle, *supra,* at 99.

Cocaine can be converted into a salt, which has a distinct molecular structure, by combining it with a third chemically distinct substance, an acid (such as hydrochloric acid, HCl). Weiss, Mirin and Bartel, *supra,* at 10. The Lewis Acid and Base Theory defines acids as: substances comprised of molecules each of which can *accept* an electron pair from another molecule. Solomon and Fryhle, *supra,* at 99. The chemical reaction between the base (electron pair donator) and acid (electron pair acceptor) changes the molecular structure of the base to form a distinct compound, a salt. *Ibid.*, at 102, 108.

In the case of cocaine, when cocaine (base) is combined with hydrochloride (acid), it becomes cocaine hydrochloride (salt). Philip Bean, *Cocaine and Crack* 3 (St. Martin's Press, Inc., 1993). The chemical formula for cocaine hydrochloride is $C_{17}H_{22}NO_4{}^+Cl^-$, a distinct molecule from cocaine. The distinction between these chemical compounds does not translate into differences in the pharmacological effects on the human body: "The active part of the drug remains unchanged whichever form is used, and the effects on the human body are the same whether the base [cocaine] or salt [cocaine hydrochloride] form is ingested." Bean, *supra,* at 3. That said, cocaine ($C_{17}H_{21}NO_4$) and cocaine

hydrochloride ($C_{17}H_{22}NO_4$'Cl), have distinct chemical definitions.

Cocaine hydrochloride can be reconverted into cocaine by combining the salt with water and another base, for example sodium bicarbonate ($NaHCO_3$). Weiss, Mirin and Bartel, *supra,* at 11. The chemical reaction between the cocaine hydrochloride and sodium bicarbonate reconverts the cocaine hydrochloride ($C_{17}H_{22}NO_4$'Cl) into cocaine ($C_{17}H_{21}NO_4$). Bean, *supra,* at 3. Cocaine made by crushing and dissolving coca leaves will have more impurities, and will be far less pharmacologically potent, than cocaine made by reconverting cocaine hydrochloride. Bean, *supra,* at 3. But as a matter of chemical definition, they are the same: $C_{17}H_{21}NO_4$. *Id.* ("crack is cocaine").

The foregoing describes chemical reactions that cause one compound to become another, distinct compound: cocaine becomes cocaine hydrochloride, which in turn can be reconverted into cocaine. These conversions affect how the substances are ingested. For example, cocaine can be vaporized and inhaled into the lungs ("smoked") while cocaine hydrochloride is unsuitable for "smoking" because it decomposes at relatively low temperatures. Bean, *supra,* at 3. On the other hand, cocaine is relatively insoluble, whereas cocaine hydrochloride dissolves readily in water and can be made into an injectable solution. Weiss, Mirin and Bartel, *supra,* at 23.

The way in which cocaine or cocaine hydrochloride is ingested is affected not only by chemical

reactions that can convert it from one compound into the other, but also by other changes – to the purity and physical form of the mixture that contains the compound – that occur during processing. Coca leaves can be chewed, or they can be crushed and mixed with solvents to dissolve the leaves and form a paste which can be "smoked." *Id.* at 10, 19-20. Processing paste from coca leaves does not involve a chemical reaction and does not change the chemistry of the compound: coca leaves and cocaine paste are both cocaine ($C_{17}H_{21}NO_4$). Only when cocaine is combined with hydrochloric acid (HCl) is there a chemical reaction that converts it into a different compound, *i.e.* cocaine hydrochloride ($C_{17}H_{22}NO_4{}^+Cl^-$).

Similarly, cocaine hydrochloride can be insufflated (breathed in through the mucous membranes in the nose); or it can be mixed with water and injected into a vein. *Id.* at 15-16, 23. Dissolving cocaine hydrochloride in water does not involve a chemical reaction; the injectable mixture is still $C_{17}H_{22}NO_4{}^+Cl^-$. It is when cocaine hydrochloride is combined with a base, for example sodium bicarbonate dissolved in water ($NaHCO_3$), that there is a chemical reaction which reconverts the cocaine hydrochloride into cocaine. Bean, *supra,* at 3. The pasty mixture containing cocaine can be heated to draw off the water, and cooled to form crystals ("crack") which can be "smoked." Weiss, Mirin and Bartel, *supra,* at 11. This last part of the process does not effect a change in the cocaine mixture's chemical makeup: the chemical definition of crack is $C_{17}H_{21}NO_4$. Bean, *supra,* at 3.

As varied as the physical forms, ways of ingesting, and potency of these mixtures may be, as a matter of chemistry, they are either cocaine or cocaine hydrochloride. A mixture containing cocaine hydrochloride, whether it is in powder or liquid form, is $C_{17}H_{22}NO_4$'Cl. A mixture containing cocaine, whether it is coca paste or crack, is $C_{17}H_{21}NO_4$. A paste made from crushed coca leaves has more impurities and is pharmacologically less potent than crack, but the substances have the same chemical definition: $C_{17}H_{21}NO_4$. Bean, *supra*, at 3.

As they stated at the beginning of this summary, *amici* devote this brief to making a few points about the chemistry of cocaine. They do not address the pharmacological effects of the drug; nor do they construe 21 U.S.C. §841(b). That said, to the extent that the statute is read to distinguish mixtures containing "cocaine," *see* 21 U.S.C. §841(b)(1)(A)(ii), from mixtures containing "cocaine base," 21 U.S.C. §841(b)(1)(A)(iii), *amici* hope to make it clear that there is no such distinction in chemistry. To a scientist, cocaine *is* a base, and a mixture containing cocaine has one chemical definition: $C_{17}H_{21}NO_4$.

ARGUMENT

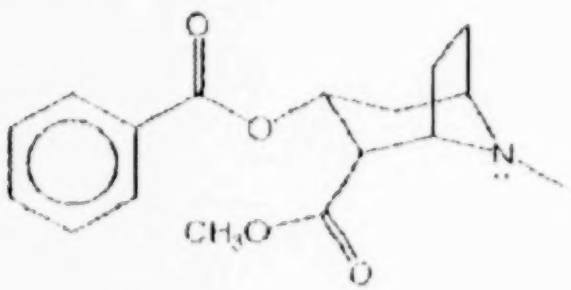
I. THE STRUCTURE AND REACTIONS OF COCAINE AND COCAINE HYDROCHLORIDE

A. Cocaine.

Cocaine is an alkaloid named after the *Erythroxylon coca*, a leafy plant which grows principally in the northern South American Andes, and to a lesser extent in India, Africa, Sri Lanka and the West Indies. Ashley, *supra*, at 13. Alkaloids are commonly defined as basic chemical compounds that contain carbon, hydrogen, oxygen and nitrogen atoms and occur naturally in a large variety of organisms, including plants. Ashley, *supra*, at 18; Loudon, *supra*, at 1108; Solomons and Fryhle, *supra*, at 994. Alkaloids are noted for their pronounced physiological, and often psychotropic, effects on animal organisms. Ashley, *supra*, at 18; Solomons and Fryhle, *supra*, at 994. Alkaloids often, but not always, are named after the plant in which they were first discovered: *cocaine* is named for the *coca* plant. Solomons and Fryhle, *supra*, at 994. Some other well known examples of alkaloids are nicotine (named for Nicot, a French ambassador who sent tobacco seeds to France) and morphine (named for Morpheus, the Greek god of sleep and dreams.) *Id.* at 995, 997. While alkaloids occur naturally, most can now be reproduced synthetically in a laboratory. *See id.* at 994 (independent synthesis has confirmed structure of alkaloids).

Alkaloids are nitrogen-containing bases. Loudon, *supra,* at 1108; *see Brisbane*, 367 F.3d at 911 ("Cocaine is a naturally occurring alkaloid – that is, a base."). There are a number of ways to define a "base," but for purposes of this fundamental discussion, an appropriate definition is provided by the well accepted and widely applicable Lewis Acid and Base Theory: a base is a substance comprised of molecules each of which can *donate* an electron pair to another molecule. Solomons and Fryhle, *supra,* at 99.

The chemical formula for cocaine is $C_{17}H_{21}NO_4$. This molecule has an electron pair on the nitrogen atom (N) that it can donate:



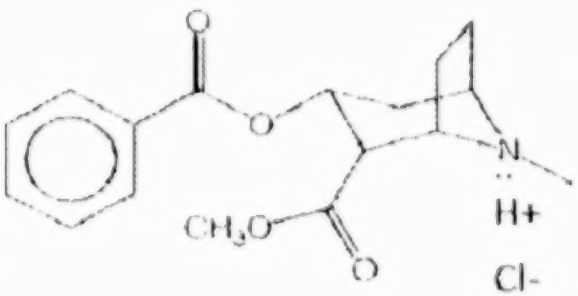
In cocaine as shown in Diagram A, the nitrogen has a free pair of electrons (··). This is what makes cocaine a base. Solomons and Fryhle, *supra,* at 99.

B. Cocaine Hydrochloride.

Cocaine can be converted from a base into a salt (which has a distinct molecular structure) by combining it with a third chemically distinct substance, an acid (such as hydrochloric acid, HCl). Weiss, Mirin and Bartel, *supra,* at 10. The Lewis Acid and Base

Theory defines an acid as a substance comprised of molecules each of which can *accept* an electron pair from another molecule. Solomon and Fryhle, *supra*, at 99. When hydrochloric acid (HCl) is dissolved in water, it disassociates into H' and Cl'. The H' is the acid part. It seeks out a pair of electrons. When the cocaine base is dissolved in the HCl solution, the H' combines with the free electrons on the cocaine's nitrogen, forming cocaine 'Cl', the salt form of cocaine (cocaine hydrochloride).

The formula for cocaine hydrochloride is $C_{17}H_{22}NO_4$'Cl. This distinct molecule is depicted in Diagram B:



The differences between the molecular structures of cocaine and cocaine hydrochloride do not translate into differences in the pharmacological effects on the human body: "The active part of the drug remains unchanged whichever form is used, and the effects on the human body are the same whether the base [cocaine] or salt [cocaine hydrochloride] form is ingested." Bean, *supra*, at 3. That said, the chemical definitions of the compounds are distinct: cocaine hydrochloride is $C_{17}H_{22}NO_4$'Cl; cocaine is $C_{17}H_{21}NO_4$.

Once cocaine hydrochloride has been formed, it can be converted back into cocaine by reaction with a basic (alkaline) substance. Bean, *supra,* at 3. This base can be ammonia (NH_3), sodium hydroxide (NaOH), sodium bicarbonate ($NaHCO_3$) or sodium carbonate ($NaCO_3$). All are bases; they all have a part (the OH or the HCO_3^- or the $CO_3^=$) with a free pair of electrons. When cocaine hydrochloride is dissolved in water that contains one of these bases, the extra H' that is attached to the nitrogen on the cocaine is removed and attaches to the alkaline substance in the solution. The cocaine hydrochloride ($C_{17}H_{22}NO_4$'Cl) is thus reconverted into cocaine ($C_{17}H_{21}NO_4$). This reconverted "base form, usually called crack" "is cocaine." *Id.*

C. Distinct Properties Of Cocaine And Cocaine Hydrochloride.

The conversions and reconversions – from cocaine ($C_{17}H_{21}NO_4$) to cocaine hydrochloride ($C_{17}H_{22}NO_4$'Cl) and back again – affect the substances' potency and means of ingestion. Cocaine can be put in a pipe and heated until the cocaine vaporizes and can be inhaled into the lungs ("smoked"). *Id.* Cocaine hydrochloride is unsuitable for "smoking" because it decomposes at relatively low temperatures, and so is destroyed by the time the substance is hot enough to vaporize. *Id.* But unlike cocaine, cocaine hydrochloride dissolves easily in water, so it can be made into a solution and injected. Weiss, Mirin and Bartel, *supra,* at 23;

see Solomons and Fryhle, *supra,* at 108, 994 ("water insoluble amines," including alkaloids like cocaine, can be converted through "acid-base reactions" "into soluble salts").

The means of ingesting these drugs are affected not only by chemical reactions that can convert and reconvert the chemical compounds, but also by other changes – to the purity and physical form of the mixture that contains the cocaine or cocaine hydrochloride – that occur during processing. These changes are addressed below.

II. PROCESSING AND INGESTING COCAINE AND COCAINE HYDROCHLORIDE

The following discussion is by no means comprehensive; it describes just a few of the means of processing and ingesting cocaine and cocaine hydrochloride, respectively. The discussion is included for the limited purpose of distinguishing processing that effects changes in the purity and certain physical attributes of the substances from the chemical reactions that convert one compound into the other and back again.

A. Cocaine.

Coca leaves can be chewed, but they are bulky and contain a lot of organic matter in addition to cocaine. Bean, *supra,* at 2; Weiss, Mirin and Bartel, *supra,* at 10. Coca leaves can be crushed and mixed

with solvents to dissolve the leaves and form a paste that is less bulky and can be "smoked" (or, more accurately, vaporized and inhaled). Weiss, Mirin and Bartel, *supra*, at 10, 19-20. This process does not involve a chemical reaction and does not change the nature of the compound: just like coca leaves, cocaine paste contains $C_{17}H_{21}NO_4$. Only when cocaine is combined with hydrochloride (HCl) is there a chemical reaction that forms a different compound, cocaine hydrochloride ($C_{17}H_{22}NO_4{}^{\cdot}Cl$).

B. Cocaine Hydrochloride.

Cocaine hydrochloride can be insufflated (breathed in through the nose); or it can be mixed with water and injected into a vein. Weiss, Mirin and Bartel, *supra*, at 15-16, 23. Mixing cocaine hydrochloride with water does not cause a chemical reaction; the injectable mixture contains $C_{17}H_{22}NO_4{}^{\cdot}Cl$. Only when cocaine hydrochloride is combined with a base, for example water containing sodium bicarbonate ($NaH^{\cdot}CO_3$) is there a chemical reaction that converts it into a different compound, *i.e.* back into cocaine.

C. Cocaine (Again.)

When cocaine hydrochloride is reconverted into cocaine, the result is a pasty mixture containing cocaine which can be heated to draw off the water, and cooled to form crystals (crack) which can be "smoked" (or more accurately, vaporized and inhaled).

Weiss, Mirin and Bartel, *supra,* at 11. The heating and cooling part of the process makes the cocaine mixture easier to smoke, but it does not effect a change in the mixture's chemical makeup: crack is $C_{17}H_{21}NO_4$. Bean, *supra*, at 3.

CONCLUSION

Cocaine and cocaine hydrochloride have similar pharmacological effects on the body, but they have different chemical definitions. A mixture containing cocaine hydrochloride, however it is ingested and whatever its pharmacological potency, is $C_{17}H_{22}NO_4Cl$. A mixture containing cocaine, however it is ingested and whatever its pharmacological potency, is $C_{17}H_{21}NO_4$.

To put this very fundamental chemistry "lesson" in the context of 21 U.S.C. §841(b), while mixtures containing cocaine hydrochloride are chemically distinct from mixtures containing cocaine, there is no such distinction between mixtures containing "cocaine," *see* 21 U.S.C. §841(b)(1)(A)(ii) and mixtures containing "cocaine base," 21 U.S.C. §841(b)(1)(A)(iii). To a scientist, cocaine *is* a base, and a mixture

containing cocaine has only one chemical definition: $C_{17}H_{21}NO_4$.

Respectfully submitted,

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